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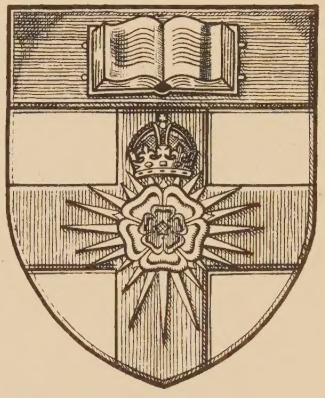

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COURT OF APPEAL.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re GARNETT.
GANDY *v.* MACAULAY.

C. A.
1885
Feb. 10.

[1883 G. 2870.]

rustee—Release—Cestui que Trust—Mistake—Lapse of Time—Evidence against Estate of a dead Man—Corroboration.

A release to a trustee set aside after the lapse of more than twenty years, and after the death of the trustee, on evidence of the Plaintiff (corroborated by the tenor of the deed) that it was executed in error. In such a case it is not necessary to prove fraud. There is no rule that the uncorroborated evidence of a claimant against the estate of a dead man will be rejected, but it will be regarded with jealous suspicion.

A testator bequeathed one-half of his residuary personal estate to his sister and one quarter thereof to each of his two nieces: he appointed his sister trustee and executrix of his will, and died in the year 1855. The residuary personal estate consisted principally of railway shares and stocks, and at the time of passing the residuary account it was valued at £42,000. The nieces lived with their aunt, who had brought them up from childhood. In 1859, the nieces executed a release of all suits and causes of action in favour of their aunt in consideration of the payment of £10,500 to each. At the time of the execution of the release, the railway shares and stocks had increased in value, and the share of each of the nieces was worth much more than £10,500. The release was drawn up by the aunt's solicitor, and the nieces had no independent advice and executed it in error, but no fraud was imputed. In 1879, the aunt died. In 1883, an action was commenced by one of the nieces to set aside the release:—

Held, that the release was invalid and must be set aside.

THIS was an originating summons for the execution of the trusts of the will of *Jeremiah Garnett*, deceased, and for the determination of a question, whether a certain deed of release was

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binding or not. The action was instituted in the year 1883 really for the determination of the latter point, and by the consent of all parties the taking of the accounts was waived.

The Plaintiff, *Frances Gandy*, and the Defendant, *Mary Hester Garnett Orme*, were entitled under the will of *Jeremiah Garnett* to a moiety of the residue of his real and personal estate, and *Henrietta Garnett* and *Richard Baxter* were appointed trustees. The will was dated the 26th of April, 1855, and the testator thereby devised and bequeathed to his sister *Henrietta Garnett* and to his friend *Richard Baxter*, all his real estate upon trust, as soon as should be convenient after his death, to sell and dispose of the same, and as to his personal estate to sell, get in, and convert into money so much thereof as should not consist of money, and as to the moneys to arise from the sale of the said real estate and as to the said personal estate, and the moneys to arise therefrom, or of which the same should consist, to pay thereout his just debts and funeral and testamentary expenses, and divide the residue or surplus of the said trust-moneys and premises into two equal parts or shares, and stand possessed of one of such parts or shares in trust for his said sister, *Henrietta Garnett*, for her own absolute use, and of the other of such parts or shares in trust for his nieces, *Mary Hester Orme* and *Frances Orme*, absolutely in equal shares; and he appointed *Henrietta Garnett* and *Richard Baxter* executrix and executor of his said will. The testator by a codicil dated the same 26th of April, 1855, bequeathed to *Richard Baxter* a legacy of £10,000, and gave to his sister all household furniture and effects, live and dead stock in and about his dwelling-house at *Waddow*, and also devised to his said sister, her heirs and assigns for ever, all his lands and hereditaments in or about the town of *Otley* in the county of *York*, and also all his lands, buildings, houses, and shops, situate within the town of *Clitheroe* in the county of *Lancaster*, and all the property in *Clitheroe*, which he held on lease from Earl *Brownlow*, and in all other respects he confirmed his said will. The testator, *Jeremiah Garnett*, died on the 5th of May, 1855, without having revoked or altered (otherwise than as aforesaid) his will or codicil, and the same were on the 7th of August, 1855, duly proved in the Prerogative Court of *York* by *Henrietta Garnett* and *Richard Baxter*.

The Plaintiff, *Frances Gandy*, was the testator's niece, *Frances Orme*, in his will named, and she was born in the month of February, 1834, and was married to the plaintiff, *Henry Gandy*, on the 3rd of November, 1859; and the Defendant, *Mary Hester Garnett Orme*, was the testator's niece *Mary Hester Orme* in his will named, and was born in the month of January, 1832, and was married to the Defendant, *George Garnett Orme* (then *George Robinson*), on the 26th of April, 1860.

At the time of the decease of the testator, *Jeremiah Garnett*, he was residuary legatee under the will of his father, who died on the 28th of March, 1853, and Mrs. *Gandy* and Mrs. *Garnett Orme* were under the same will legatees of a sum of £24,000, which was thereby bequeathed to *Jeremiah Garnett* and *Henrietta Garnett* and two other trustees (who did not act) in trust in equal moieties for the benefit of Mrs. *Gandy* and her sister and their respective children, and *Jeremiah Garnett* and *Henrietta Garnett* were the sole acting executor and executrix of the same will. These legacies remained unpaid, and the residue of the estate of *Jeremiah Garnett*, which consisted principally of stocks and shares then standing in the joint names of *Henrietta Garnett* and himself, as executors of his father, still remained unascertained at the time of the decease of *Henrietta Garnett* as hereafter mentioned. Previously to Mrs. *Gandy's* marriage with her husband, the male Plaintiff, and (as she believed) with a view to the settlement thereon then about to be made, a deed of release in relation to the estate of *Jeremiah Garnett* was prepared, and she and her sister were requested to execute the same, which accordingly they did on or about the 26th of September, 1859. The indenture of release was dated the 26th of September, 1859, and was expressed to be made between *Mary Hester Orme*, spinster, of the first part, *Frances Orme*, spinster, of the second part, and *Henrietta Garnett* and *Richard Baxter* of the third part; and after reciting the will and the codicil of *Jeremiah Garnett*, and his death and probate of his will and codicil, it proceeded as follows:—

"And whereas the said testator had no lands, hereditaments, or real estate, save what were devised by his said codicil to the said *Henrietta Garnett;* and whereas all the testator's debts and funeral and testamentary expenses have been paid and satisfied,

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and upon taking the account there was found to be a balance available for division arising from the residuary personal estate of the said testator after payment of all legacy duties and other outgoings amounting to £42,202 10*s.* 6*d.*, which has since been distributed in the following proportions, to wit, to the said *Henrietta Garnett* £21,101 5*s.* 3*d.*, being one half of the said balance, to the said *Mary Hester Orme* the sum of £10,550 12*s.* 7½*d.*, being one fourth part of the said balance, and to the said *Frances Orme* the like sum of £10,550 12*s.* 7½*d.*, being the remaining fourth part of the said balance, as they, the said *Henrietta Garnett*, *Mary Hester Orme*, and *Frances Orme*, do hereby respectively admit and acknowledge; and whereas the said *Mary Hester Orme* and *Frances Orme* being satisfied of the correctness of the said account have agreed to execute to the said *Henrietta Garnett* and *Richard Baxter* a general release in manner hereinafter contained: Now this indenture witnesseth that the said *Mary Hester Orme* and *Frances Orme* do hereby respectively acknowledge, declare, and testify, that they have actually had and received, before the sealing and delivery of these presents of and from the said *Henrietta Garnett* and *Richard Baxter*, or one of them, the aforesaid sums of £10,550 12*s.* 7½*d.* and £10,550 12*s.* 7½*d.* hereinbefore mentioned, and do acknowledge the same to be in full for all the share and interest to which they are entitled of the residuary personal estate of the said *Jeremiah Garnett*, deceased, given and bequeathed to them in and by the said recited will and codicil; and in consideration of the said payment do hereby acquit, release, exonerate, and for ever discharge the said *Henrietta Garnett* and *Richard Baxter*, their heirs, executors, and administrators, and their respective lands and tenements, goods and chattels, of and from all and every the trusts reposed in the said *Henrietta Garnett* and *Richard Baxter* in and by the said hereinbefore in part recited will and codicil by the said *Jeremiah Garnett*, deceased, as such trustees and executors as aforesaid; and of and from all and all manner of action and actions, suit and suits, cause and causes of action and suit, debts, dues, sum and sums of money, accounts, reckonings, damages, claims, and demands whatsoever, either at law or in equity, which they, the said *Mary Hester Orme* and *Frances Orme*, or either of them, now have or hath, or which they or either of them, their or either of

their heirs, executors, or administrators may hereafter have, claim, challenge, bring, or be entitled to, upon or against the said *Henrietta Garnett* and *Richard Baxter*, their or either of their heirs, executors, or administrators, for or by reason or means or on account of the trusts contained in the said hereinbefore in part recited will of the said *Jeremiah Garnett*, deceased, or of any acts, proceedings, neglects, or defaults of them, the said *Henrietta Garnett* and *Richard Baxter*, or either of them, or in any other manner howsoever: Provided always, and it is hereby declared, that nothing herein contained shall extend to release or prejudice any claim or demand, which the said *Mary Hester Orme* and *Frances Orme*, or either of them, now have or hath, or which they or either of them, their or either of their executors or administrators, may hereafter have against the said *Henrietta Garnett* and *Richard Baxter*, or either of them, in any manner other than in the capacity or character of residuary legatees named in the will of the said *Jeremiah Garnett*, deceased, any rule of law or equity to the contrary notwithstanding."

At or about the same time at which the indenture of release was executed, an indenture of settlement in contemplation of the marriage of the Plaintiff was executed, whereby after reciting that *Frances Orme* was absolutely entitled (amongst other property) to a sum of £10,000, being part of her share of the residuary personal estate bequeathed to her by the will of her uncle, *Jeremiah Garnett* the younger, which sum was therein stated to be in the hands of the said *Henrietta Garnett*, the said sum of £10,000 was settled as therein mentioned.

The indenture of release and the indenture of settlement were both prepared under instructions given by *Henrietta Garnett*, and at the time of the execution by Mrs. *Gandy* and Mrs. *Garnett Orme* of the indenture of release they were living under the care of *Henrietta Garnett* (who was their aunt, and with whom they had both lived from their infancy,) and they had no independent advice as to the affairs or estate of *Jeremiah Garnett*, or the accounts thereof, and no means of judging as to the correctness of the recitals contained in the release. A day or two previously to the day originally fixed for her marriage (which was postponed in consequence of the death of her husband's father,)

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the Plaintiff, *Frances Gandy*, was called upon by Mr. *Dixon*, of *Clitheroe Castle* (since deceased), who was the member of a firm of solicitors who acted for the aunt, and requested by him to sign several documents, which he as well as her aunt said that it was necessary she should sign before her marriage, and she accordingly did sign them. None of these documents were either read over or explained to her, and she had no knowledge of the contents of any of them, nor were any accounts of any description shewn to her. The sum of £42,202 10*s.* 6*d.* in the release mentioned was the value stated in the residuary account of the personal estate of *Jeremiah Garnett*, passed by *Henrietta Garnett* and *Richard Baxter*, on the 5th of May, 1856, but the last-mentioned personal estate consisted principally of stocks and shares in railway companies, the value of which had very greatly increased between the time of passing the residuary account and the date of the release; and, moreover, the income, which had in the meantime accrued therefrom, was never accounted for either to *Frances Gandy* or to her sister. Until about the year 1881 *Frances Gandy* was not aware that she had ever become entitled as a residuary legatee to one-fourth share of the whole amount and value of the residuary personal estate of her uncle, but on the contrary she had been informed by her aunt, and believed, that she and her sister were entitled only to a sum of £10,000 each as a legacy under his will, and to the interest thereon. The sum of £10,550 12*s.* 7½*d.* in the indenture of release stated to have been paid to her, was never in fact paid to her, but at or about the time of the execution of the release a sum of about £500 was paid to her by *Henrietta Garnett*, being (as she believed) the amount of the difference between the sum of £10,000 comprised in the settlement and the sum of £10,550 12*s.* 7½*d.* mentioned in the release. Beyond these sums nothing had been paid or transferred to her or any person claiming through or under her in respect of the one-fourth share, to which she as one of the residuary legatees became entitled, of the residuary personal estate of her uncle, *Jeremiah Garnett*.

Henrietta Garnett and *Richard Baxter* paid or transferred to *Mary Hester Orme*, or to trustees for her, certain moneys, stocks, funds, or securities, as representing the one-fourth share to which she was entitled in like manner as residuary legatee.

The whole of the balance of the residuary personal estate of *Jeremiah Garnett* (over and above the amounts paid or transferred for the benefit of *Frances Gandy* and *Mary Hester Garnett Orme*), was retained by *Henrietta Garnett* for her own use, and the difference between the sums actually paid and transferred as representing their one-fourth shares and the actual amount or value of their one-fourth shares had never been accounted for to them or either of them.

Henrietta Garnett died on the 27th of September, 1879, intestate, leaving her nieces, *Mary Hester Garnett Orme* and *Frances Gandy*, her sole next of kin, and letters of administration to her personal estate were granted to them.

At the time of the death of *Henrietta Garnett* a large amount of railway and other stocks and shares, amounting in value at that date to the sum of £68,000 or thereabouts, part of the personal estate of *Garnett* the father, still remained outstanding and unadministered; and in order that the same might be got in and administered, letters of administration with the will annexed of the unadministered personal estate of *Garnett* the father, were in December, 1879, granted to *Richard Baxter*, being the surviving executor of the will of *Jeremiah Garnett;* but he died on the 20th of June, 1880, leaving part of it still unadministered, and thereupon letters of administration with the will annexed of the personal estate of *Garnett* the father, twice left unadministered, were granted to the Defendant, *Mary Hester Garnett Orme* (then *Mary Hester Robinson*), who afterwards paid the legacy of £24,000.

The Defendants, *C. Z. Macaulay* and *C. J. Reithmuller*, were the legal personal representatives of *Richard Baxter* and also of *Jeremiah Garnett*, being surviving executors of the will of *Richard Baxter*, who was the surviving executor of the will of *Jeremiah Garnett.*

Three affidavits were during the hearing in the Court of Appeal read to the Court, which went to shew that the Plaintiff, *Frances Gandy*, and the Defendant, *Mary Hester Garnett Orme*, at the time of executing the indenture of release were not in proper possession of the facts, and that it was executed under a mistake as to its effect. Evidence was also given of an increase between

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1855 and 1859 of over £5000 in the value of each fourth share, and also of its subsequent increase.

At the hearing of the argument upon the summons Vice-Chancellor *Bacon* was of opinion and declared that the release was valid and binding according to its tenor.

The Plaintiffs appealed, and the appeal came on for hearing on the 10th of February, 1885.

Hemming, Q.C. (*Shebbeare* with him), for the Plaintiffs:—

The long lapse of time is no bar to the relief asked, and the evidence, though it is chiefly that of the ladies interested, is confirmed by the internal evidence of the release itself: *Gordon* v. *Gordon* (1); *Bowles* v. *Stewart* (2).

Millar, Q.C., for the Defendants, *George Garnett Orme* and *Mary Hester* his wife.

R. Horton Smith, Q.C., *Ingle Joyce*, *Grosvenor Woods*, and *Samuel Dickinson*, for the other Defendants:—

After the lapse of time and the death of *Henrietta* it is too late to impeach the release.

BRETT, M.R.:—

The question raised in this case before us is whether a release given by two ladies who are now alive, to an aunt, who is now dead, is to be considered in these proceedings as binding.

It was said that the release to the aunt had no value at all in itself; that the person to whom it was given or those representing her were bound to shew—inasmuch as she had been a trustee—that everything with regard to that deed had been fully explained in the first instance. I cannot agree to this proposition, which is in effect that if a deed is produced in a Court of Equity, although in a Court of Common Law it would not need any consideration to be proved, the person in whose favour the deed is executed is thereupon to have the burden of proof thrown on him of shewing that the deed was given for a good consideration.

Another point was taken. It was said that this release cannot

(1) 3 Sw. 400. (2) 1 Sch. & Lef. 209.

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be questioned because the person to whom it was given is dead, and also that it cannot be questioned unless those who object and state certain facts are corroborated, and it is said that that was a doctrine of the Court of Chancery. I do not assent to this argument; there is no such law. Are we to be told that a person whom everybody on earth would believe, who is produced as a witness before the Judge, who gives his evidence in such a way that anybody would be perfectly senseless who did not believe him, whose evidence the Judge, in fact, believes to be absolutely true, is, according to a doctrine of the Courts of Equity, not to be believed by the Judge because he is not corroborated? The proposition seems unreasonable the moment it is stated. There is no such law. The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any Judge who hears it ought to be, first of all, in a state of suspicion; but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd. And what is ridiculous and absurd never is, to my mind, to be adopted either in Law or in Equity. The burden of proof in the first instance, I think, does lie on those who challenge a deed as old as this. But they have given evidence of certain circumstances, which make it necessary to look carefully at the release itself. They have shewn, by evidence which is not contradicted, and which obviously is true, that if this release is binding, the two ladies did give up by it a valid claim which each of them had to the extent of £5000 or more, not upon any dispute which might make a compromise desirable, but without any dispute and without any consideration. That is shewn to us to be the necessary result. But, then, the moment I come to that conclusion I must look at the deed itself, and I look for a recital to shew why the two nieces did so strange an act. But I find no recital which would call to their attention their position. Therefore, I must notice the fact of giving up the property and the want of the recital in the deed. These are two circumstances much to be considered, and they seem at once

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to shift the burden of proof, and to make it necessary that those who wish to uphold the release should shew that full knowledge was given to these ladies of what they were doing before they came to so strange a determination.

What has been proved? It has been proved beyond doubt that the nieces were certainly not under age; that one of them was twenty-five and the other twenty-seven years of age. That would be some evidence to shew that they might have known their own rights. But it is proved that those two ladies had lived from their childhood with an old lady, who was their aunt, to whom this release was given; that she had brought them up as if she was their mother; she was, therefore, a person to whose slightest wish they would be inclined at once to bow, and in whose slightest intimation they would be inclined at once to acquiesce. The release was drawn by a man to whom they must have looked up with very considerable respect; he was a solicitor, whose description shews that he was a person of considerable reputation and eminence in the place where he lived at that time. That solicitor would be able to speak to these young ladies with great authority, and would very likely be able to make them conclude that everything was right, if, indeed, they thought at all as to the matter. The intention of the two ladies themselves to speak the truth, nobody attempts to challenge. It is true that they may have forgotten, but they declare that they had no person to assist them. I think they could not forget whether they had a solicitor of their own to advise them; they say they had no person to assist them, and that this gentleman did not explain to them what the deed was. If he had explained to them the effect of the deed, it is very doubtful whether it could have stood. However, I desire to rest on the fact that they swear, and, to my mind, swear with an appearance of the greatest probability, that he did not. It seems to me almost impossible to conceive that if he had known all the circumstances, if he had known of the increase in value of the investments, he could have said to them: "Now, young ladies, this property has increased in value: you are not only entitled to £10,550 each, but you are each of you entitled to £5000 more: I tell you that, and I tell you that if you sign this release, you each of you give up that £5000. I tell

you that you ought to do it, or at least I leave you to judge whether you ought to do it, because your aunt asks you to do it." Is it possible to believe that? Then if he did not say that to them, why did he not? Either because he intended to cheat them—which I protest I think there is not the slightest evidence to shew—or because he did not know the matter, because it had not been called to his attention, because he had done the business through the clerks in his office, and had not investigated the matter and did not know of the increase in value. Then, if he did not know it—which must be assumed in order to protect his honour—it is impossible that he could have told them. Therefore, it seems to me that the true inference of fact is that he did not know it, and that the aunt did not know it, and that the young ladies did not know it. It follows, then, that this deed of release was signed by them in a state of ignorance of the facts, an ignorance participated in by the aunt and by the solicitor.

If that is the true state of things, ought that, in such a suit as this, and before such a Court as this, to stand? That is a question of law. Now the Vice-Chancellor did not look at it from that point of view. He did not look at the case in the view that there might be ignorance on the part of everybody. He stated the problem which he had to solve thus: "Mr. *Hemming* put it she has made a mistake, or she may have miscalculated, but the consequence of that mistake was to put into her pocket a great deal of this money, so that mistake seems to me to be out of the question, because if I were to listen to the complaint preferred on behalf of these two ladies, I must say that this was a very wicked old woman, and that she and her more wicked attorney conspired to cheat those two orphans out of the money which belonged to them." Therefore, the Vice-Chancellor turned away from the consideration of the question what the law would be if there was a miscalculation, if there was a mistake, if nobody understood the facts, and he frightened himself with the enormity of the proposition that he himself lays down, namely, that in order to find against this release he must find that the old lady was a wicked old woman, and that the attorney was more wicked than she was, and that they were conspiring, that is, intending, to cheat these two ladies out of money that belonged to them.

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After that he again says: "After these years, the release having been executed by two adults, spinsters, in contemplation of their marriage"—which is a little erroneous, for one of them at that time was not contemplating marriage otherwise than all women do, I suppose—"I am asked to brand this old lady, or her memory, rather, and the solicitor who was employed, with infamy, because they have committed a plain deed of robbery on these two orphan girls." Then he goes on to say: "Anything so preposterous or unreasonable I have never heard suggested." I agree with him. If it were necessary to find in this case that there was the smallest taint of fraud in the mind of that old lady, or of the solicitor, I would say, as he says, that anything more preposterous or unreasonable than to find, on this evidence, that they were guilty of fraud and conspiracy I have never seen. There is no evidence of it, and if it is necessary to find that, I agree absolutely and entirely with the judgment of the Vice-Chancellor. But to my mind it is not, and cannot be, necessary to find that. In a Court of Equity, although this document is under seal, nevertheless if the facts make it clear to the mind—all questions of the burden of proof being gone, and the whole evidence being before the Court—that this deed was executed so as to release the aunt without any consideration or benefit whatever to the young women, and was executed under a mistake and without full knowledge of the facts by those who signed it, they having no professional assistance and no aid, I think that the cases which have been cited shew that that release cannot be considered to be binding, and the matter ought to be regarded, therefore, as though that release had never been given. For that reason, and for that reason alone, I am of opinion that we must disagree with the decision of the Vice-Chancellor.

COTTON, L.J.:—

I also am unable to agree with the Vice-Chancellor's view. Before I go into the case, I should mention the circumstances under which it comes before us. It is to obtain the direction of the Court on an originating summons as to what is to be done in distributing the estate of a person who is dead; and I mention it for this reason. It must be taken that the objection to this

mode of proceeding in such a case has not been urged before us, and we give no opinion at all upon it, so that it may not be said hereafter, if the question is really raised, that we have allowed it to be done here.

What are the facts? The Appellant, *Frances Gandy*, and one of the Respondents, *Mary Hester Garnett Orme*, say this: "We find that the estate of our aunt, who is our trustee, she being one of the executors of *Jeremiah Garnett* the younger, and we being entitled to a share in his residuary estate, includes a very large sum for which she did not account to us." As against that claim a release is set up, executed in 1859, that is many years ago, and it is said that by that deed, after receiving £10,550 each, they released all claims against this lady as the personal representative of *Jeremiah*. No doubt there is a deed which has that effect, and the question is, can that deed stand? In my opinion it cannot.

It must be taken that at the time when that deed was executed, the sum which the nieces were each entitled to being one-fourth share of the residuary estate of *Jeremiah* was not £10,550, but at the very least £15,000, that is to say, that this deed, which purported to be a release in full to the executrix on payment of £10,550 as the share of each of these ladies, left in her hands—it was not put into her pocket, but left in her pocket—two sums of £5000. On what ground is that deed to stand? Is it suggested that these ladies after full advice of an independent solicitor determined that they would make this large gift to their aunt? In my opinion if, shortly after the young ladies had found out what the effect had been, and had questioned it, the burden would have been upon the aunt to uphold it: but I think it unnecessary here to enter into the question of the burden of proof. We have to see on the facts and evidence before us whether the release which in fact at that time left in the pocket of the aunt a sum of £10,000 or more, can be effectual to bar the claim now raised for this sum, which the trustee has not accounted for. We have evidence. I agree that we cannot depend with very great certainty on evidence given by persons speaking of events which occurred more than twenty years ago; and if it had been in a different form, one might not have relied, as I do rely, on the evidence which has been given by these ladies; what they say is

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this: "At the time when we signed and sealed this document, we did not know anything about the real state of the accounts of *Jeremiah's* estate. We did not know that besides this sum there was any other sum in the hands of our aunt, who was our trustee, which we were in any way entitled to. We had no account given to us, we had no explanation given to us, and therefore we really signed this on our part in great error as to what our rights were." Then we have the evidence, which has been admitted, and there is something in it, of a gentleman who was a member of the firm at the time when this deed was executed. It is not very exact; but it shews that nothing was done beyond a reference to the residuary account of the estate of *Jeremiah* before this deed was prepared, and that the sum there stated to be that which was properly divisible between these two ladies, was, in fact, that which was mentioned in the residuary account; but that in fact at this time by the increase in the value of the securities which were then still existing in the hands of the aunt, there had been an increase of £5000 to each of those shares.

Now what do we see in the deed? Does that corroborate what is said by these ladies or not? In my opinion it strongly corroborates it because there is a statement of the will, and then the deed proceeds, "Whereas all the testator's debts and funeral and testamentary expenses have been paid and satisfied, and upon taking the account there was found to be a balance available for division arising from the residuary personal estate of the said testator after payment of all legacy duties and other outgoings amounting to £42,202 10*s.* 6*d.*, which has since been distributed in the following proportions, to wit, to *Henrietta*, the aunt, £21,101 5*s.* 3*d.*" and the sum of £10,550 12*s.* 7½*d.* to each of these young ladies. "And, whereas the said *Mary Hester Orme* and *Frances Orme*, being satisfied of the correctness of the said account, have agreed to execute to the said *Henrietta Garnett* and *Richard Baxter*" the executrix and executor, the release following. Then they acknowledge the receipt of these two sums of £10,550 and acknowledge the same to be in full for all the share and interest to which they are entitled in the residuary personal estate of *Jeremiah*. Now it has been suggested, and I think that clearly is so, that the statement here of the account so taken refers to the

residuary account; but then the deed dealt with the account as shewing at the moment when it was executed, what were at that time the shares to which these young ladies were entitled; it represented therefore, if not in terms, yet in fact, that what was shewn by the residuary account was still the amount of the share to which these young ladies would be entitled. Now I am of opinion that that strongly corroborates what is said by these young ladies, that in fact, the account had never been explained to them. The account would have shewn that they had never before this got their shares; that the estate was in the hands of their aunt and her co-executor, and that that estate, to a moiety of which they were entitled between them, was not of the value which it was at the time when the residuary account was taken, but was worth considerably more. Now, looking at this deed, I cannot come to any other conclusion than that the nieces were never informed what was the result of those four years which had elapsed since the residuary account was passed. Therefore, in my opinion, it would be impossible for the trustee to resist a further account and to keep in her hands money which she has not accounted for already to her *cestuis que trust*, the defence being a release by a deed which represents that that which was true four years before the release was executed, was then the continuing state of account. That being so, in my opinion this deed cannot stand to prevent these ladies claiming from the estate of their aunt that which they have not already received in respect of the estate of *Jeremiah*.

Then it is said, if this view is adopted, the aunt and the solicitor are charged with the grossest fraud. In my opinion that is not the result of the evidence. In my opinion that is not necessary in order to enable these ladies to set aside this release. In my opinion, at least as regards the solicitor, he was in utter mistake; as regards the aunt, I should think she also was under a mistake, as to what the rights of her nieces were, even if she knew or appreciated the increase in value of the securities which had occurred during these years. Therefore the ground on which this case should be decided is that, on the evidence, the young ladies, as well as the other parties, were in manifest error as to their true position as regarded their rights under the will of

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Jeremiah, and when that is made out, even although there has been no fraud, yet in my opinion the trustee ought not to be allowed, and in this case cannot be allowed, to shield herself from accounting for trust money in her hands, simply by putting forward a document which has been signed and sealed without any knowledge of the real facts, without any communication of their rights, though the release in its terms would bar the parties from insisting upon them. I am of opinion, therefore, on that ground, which, I think, is the right explanation of the case, that these ladies are entitled to have this release disregarded in administering the estate of their aunt.

Then it was argued that it was a hardship to set aside the release after the death of the aunt. Undoubtedly one looks with suspicion in some cases on claims, which are brought forward after the death of the person against whom the claims are made, when they might have been brought forward before. But, here, on the evidence, these ladies never knew until after the death of their aunt that they had any rights which they were giving up, any rights beyond those which were stated on the face of that deed in respect of which they received those sums. In my opinion, therefore, it would be wrong to disregard the claim. It is not a claim originating from transactions as regards the release, but a claim which originated from proceedings begun some years before; and the real thing is that here the proceeding is an endeavour —and we must treat it in that way—to insist on that release in order to prevent a sum of money coming out of the estate of the trustee. In my opinion the rule referred to has no bearing on such a case as this, and ought not on the evidence which we have to prevent us from coming to what in my opinion is the correct conclusion.

FRY, L.J.:—

I am of the same opinion. It appears to me that this is one of those cases which it is the duty of the Court to watch with great jealousy, because the claim is brought forward against the estate of a deceased person when that person, who was a chief actor in the transaction impugned, and one other chief actor concerned in the transaction are dead; nevertheless, having watched the case

with the utmost jealousy of which I am capable, the Appellants have convinced me that this is a case in which the release cannot stand. I agree with what has been said by the Master of the Rolls and the Lord Justice, that it is by no means necessary to prove fraud. It is enough to avoid a release if the Court is satisfied that it has been made under error in a material particular, and that is certainly not the less so where the release is given by a *cestui que trust* to a trustee, and by young ladies who have been living under the care of their aunt to a person who has stood to them *in loco parentis*.

Now the ladies have themselves given evidence, which, if it can be relied on, shews that they did not understand what they were really doing when they executed this release. But evidence given by ladies, one of whom was upon the eve of marriage, with regard to business transactions is, although it may be perfectly honest, open to considerable doubt. My experience goes to shew that very often persons say that a deed has never been explained to them, and that accounts have never been produced, when in fact the deed was carefully explained and the accounts were produced. And therefore it has become exceedingly material in my mind to see how far the statements of these two ladies have been corroborated by the other circumstances of the case. Now in the first place it is to be borne in mind that they have not been cross-examined. It may well be that a cross-examination of these ladies would increase the weight to be attached to the evidence which they have given in chief. But what I rely upon mainly are the terms of the deed itself, because it appears to me that they very cogently confirm the statement made by these ladies. By that deed they were giving up each something like £5000 or £6000 to their aunt; and if the solicitor who prepared that deed had attached the due weight to that fact, it is almost impossible that the fact should not have appeared in the recital to the deed. No prudent solicitor, no competent solicitor, who was preparing a deed by which he knew that young ladies were giving up that large sum to an aunt with whom they were living, would have kept that fact off the face of the deed, unless he had been minded that a fraud should be committed, and that they should grant a release in entire ignorance of their rights. Therefore I think

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that the silence of the deed is cogent evidence of one or other of two things: either that he who prepared the deed desired to conceal something from the young ladies, which I do not believe; or that he proceeded in entire ignorance of their real rights: and that is the conclusion at which I arrive from their evidence and from the deed itself. I think that carelessly and ignorantly, rather than wilfully or fraudulently, the parties who procured the release assumed that the residuary account was that which really concluded the rights of the parties. They omitted to notice the accumulations of income which might have arisen in the interval, and also the improvement in the value of the property; and they proceeded to obtain this release upon the footing of that residuary account. Now that was an entirely erroneous view, and a release so obtained cannot in my opinion stand. Then I think that some confirmation of the state of mind of these ladies is to be derived from the fact that they knew nothing about the £12,000 legacies. I am satisfied that they did know nothing about it from the fact that neither they nor their husbands ever received a penny or applied for a penny of that income during the life of the aunt. Therefore I think the conclusion on the evidence—having watched it with all the jealousy with which it seems to me it ought to be watched—is that this release was executed under a mistaken apprehension as to the rights of these young ladies, and that the true facts of the case were not brought home to their minds before they made this large gift to the aunt, with whom they were residing (1).

Solicitors: *Johnston, Harrison & Powell*, agents for *Little & Lamonby, Penrith, Cumberland; Richard Smith & Wilmer; Janson, Cobb, Pearson & Co.*

(1) By the order of the Court of Appeal it was declared that "this Court doth reverse the said order" of Vice-Chancellor Bacon, "and doth declare that in administering the estate of *Henrietta Garnett*, in the said order named the indenture dated the 26th of September, 1859, therein mentioned, is not to be treated as a binding release of all claims by the Plaintiff and the said Defendant, *Mary Hester Garnett Orme*, in respect of the residuary estate of the above-named *Jeremiah Garnett*."

J. E. H.

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C. A. 1885 July 14.

[1884. B. 2495.]

Company—Shares—Equitable Mortgage—Priority—Deposit of Certificates of Shares—Articles of Association—Lien of Company on Shares for Moneys due from Shareholder—Notice—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 30 [*Revised Ed. Statutes, vol. xiv., p.* 209].

The articles of association of a company registered under the *Companies Act*, 1862, provided that the company should have a first and permanent lien and charge, available at law and in equity, on every share, for all debts due from the shareholder to the company. A shareholder deposited the certificates of his shares with his bankers as security for the balance due from him to them on his current account, and notice of the deposit was given to the company. The certificates stated that the shares were held subject to the articles of association :—

Held, that the company could claim priority over the bankers in respect of moneys which became due from the shareholder to the company, even after notice of the bankers' advance had been given, on the following grounds :—

First (by *Brett*, M.R., and *Baggallay*, L.J., *Fry*, L.J., doubting), that by the articles of association a contract had been entered into between the company and its shareholder whereby it should have a first lien on his shares for any debt due from him, that by this contract a priority was conferred upon the company as against all persons claiming only equitable interests in the shares and having notice of the articles of association, and that the doctrine of *Hopkinson* v. *Rolt* (1) did not apply :—

Secondly, upon the authority of *Société Générale de Paris* v. *Tramways Union Company* (2), that by the deposit of the certificates of the shares with the bankers as a security for advances, only an equitable interest or trust was created in their favour, and that the *Companies Act*, 1862, s. 30, relieved the company from taking notice of any trust created in respect of its shares.

Decision of *Field*, J., reversed.

APPEAL of the Defendants from the decision of Mr. Justice *Field* in favour of the Plaintiffs.

The facts of the case are fully set forth in the report of the hearing before Mr. Justice *Field* (3), and it is necessary here only to make the following statement of them :—

The Defendants were a company registered under the *Companies*

(1) 9 H. L. C. 514. (2) 14 Q. B. D. 424.
(3) 29 Ch. D. 149.

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Act, 1862. They carried on the business of coal proprietors. By clause 103 of the articles of association "the company shall have a first and permanent lien and charge, available at law and in equity, upon every share of every person who is the holder, or one of several joint holders, thereof, for all debts due from him, either alone or jointly with any other person, whether a shareholder or not, to the company." *William Fletcher* and *J. F. Easby* were respectively shareholders in the company. Each of them carried on business as a coal merchant, and purchased coals from *Briggs & Co.* On the 6th of November, 1879, *Fletcher* deposited with the Plaintiffs certificates of shares belonging to him in the Defendant company to secure the balance due on his current account; and on the same day *Easby* made a similar deposit. The certificates of the shares stated that the shares were held subject to the articles of association of the company. On the 13th of November notice of these deposits was given by the Plaintiffs to the Defendants, who on the 15th of November acknowledged the receipt of the notice. In June, 1881, *Easby* deposited with the Plaintiffs the certificates of some more shares in the Defendant company as a security for the balance of his current account, and notice of this deposit was given to the Defendants on the 20th of June, 1881, and the receipt of the notice was acknowledged by the Defendants on the 22nd of June. At this time *Easby* was indebted to the Defendants, but the amount due from him was repaid in September, 1881. On the 5th of July, 1882, *Fletcher* deposited with the Plaintiffs as a further security for the balance of his current account the certificates of some more shares in the Defendant company. On the 11th of July, 1882, notice of this deposit was given by the Plaintiffs to the Defendants, and the receipt of the notice was acknowledged on the same day. At that time *Fletcher* owed the company £782 10*s.* 5*d.* On the 1st of December, 1883, *Fletcher* filed a liquidation petition. At that time he owed the Defendants about £1000 for coal supplied. On the 31st of December, 1883, *Easby* filed a liquidation petition. At that time he owed the Defendants, for coal supplied, £1593 5*s.* 3*d.* After the date of the notice of the 22nd of June, 1881, *Easby* received no further advances from the Plaintiffs. At that time he owed them a large sum. After the date of the notice of the

11th of July, 1882, *Fletcher* received further advances from the Plaintiffs, and made them various payments from time to time.

This action was brought for an account of what was due to the Plaintiffs as mortgagees by deposit of the certificates for principal, interest, and costs, and to have their securities realized by foreclosure or sale.

At the trial of the action before Mr. Justice *Field* that learned Judge was of opinion that *Hopkinson* v. *Rolt* (1) applied, and that the Defendant company could not claim priority over the Plaintiffs in respect of moneys which became due from the shareholders to the Defendant company after notice of the Plaintiffs' advance, but that the Plaintiffs were entitled to priority (2).

The Defendants appealed.

Karslake, Q.C. (*Dibdin*, with him), for the Defendants:—

The facts in the two cases appear to be the same, except that in *Easby's* case the debt due at the time of his insolvency to the Defendants was wholly contracted, after they had received notice of the charge upon the shares created by him in favour of the Plaintiffs. The Defendants are entitled to succeed on either of the following grounds.

First, clause 103 of the articles of association gave to the Defendants an absolute lien on the shares of any member for money due from him: no provision of a similar nature was contained in the mortgage-deed in *Hopkinson* v. *Rolt*, which therefore does not apply. To state this point for the Defendants very shortly, by clause 103 a contract was created between the Defendant company and its shareholders that the company should have a first lien on the shares; the Plaintiffs are only equitable owners, and can have no better title than the legal owners, that is, the registered holders. The Defendants admit that, as between the Plaintiffs and the shareholders, a burden was put upon the shares; but that burden does not exist as against the Defendants, for the doctrine of *Hopkinson* v. *Rolt* is not to be extended to mortgages of property, where by the very terms of the document creating the first mortgage a lien is given to the mortgagee. The word "permanent" in clause 103 means "enduring" or

(1) 9 H. L. C. 514. (2) 29 Ch. D. 149.

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"continuing." *New London and Brazilian Bank* v. *Brocklebank* (1) is a strong authority in favour of the Defendants, for in that case a clause like clause 103 in the articles of association of the Defendant company was held to override the rights of those who were interested in trust funds invested in shares. The doctrine laid down in *Lindley* on Partnership (2) is directly in point for the Defendants.

Secondly, the only effect of the deposit of the certificates with the Plaintiffs was to create a trust in their favour. The Defendant company is registered under the *Companies Act*, 1862, and by sect. 30 of that statute it is exempted from any liability to take notice of trusts: *Société Générale de Paris* v. *Tramways Union Co.* (3) is a conclusive and binding authority as to this point.

Ince, Q.C., and *Farwell*, for the Plaintiffs:—

As to the first ground urged by the Defendant company, it is submitted that the view of Mr. Justice *Field* was right, and that *Hopkinson* v. *Rolt* (4) is in point for the present case. The Defendants cannot rely upon *New London and Brazilian Bank* v. *Brocklebank*; the decision in that case was incorrect, for, as was pointed out by Mr. Justice *North* in *Miles* v. *New Zealand Alford Estate Co.* (heard June 24th, 1885), it is founded on reasoning inconsistent with *Hopkinson* v. *Rolt*.

As to the second ground relied upon by the Defendant company, it is to be observed that in *Société Générale de Paris* v. *Tramways Union Co.* the company could be made liable only as a trustee, and it was properly held to be exempted from liability by the *Companies Act*, 1862, sect. 30: in that case the company had no interest in the shares. But the present case is not one of mere trusteeship; the company itself is a mortgagee, and must be affected with notice like any other mortgagee. The circumstance that the Defendant company itself has an interest in the shares, distinguishes the present case from the *Société Générale de Paris* v. *Tramways Union Co.* If the argument for the Defendant company were right, clause 103 would be a useless provision.

(1) 21 Ch. D. 302.
(2) 4th Ed. vol. i. p. 686.
(3) 14 Q. B. D. 424.
(4) 9 H. L. C. 514.

BRETT, M.R.:—

In this case two persons were shareholders in the Defendant company: they were, therefore, subject to the articles of association, including clause 103. The meaning of that clause seems to me to be this, that whenever a shareholder becomes indebted to the company, the company shall have a lien and charge upon his shares in respect of each debt which he owes to it. That is the first point. But that is not the whole of clause 103, because it goes on to say that that lien and charge, which arises the moment that the debt exists, shall be the first and permanent lien available at law and in equity. That is the contract under which these persons became shareholders. They have become indebted to the company, and therefore, in respect of those debts, as between them and the company at all events, the company had a lien and charge upon their shares—whether they (the shareholders) had any former debts to others or not—by reason of the provision, that the company shall have a first charge and lien available at law and in equity. If the bank had advanced the money which they did advance to these two shareholders upon their shares, without any notice of this contract between these shareholders and the company, the result might have been different; but as they have advanced the money to the shareholders with notice of that contract, it seems to me that they must be taken to have advanced the money subject to that contract. Therefore, as to the extent of the meaning of this clause, and of the notice of it which was given to the bank when and before they advanced the money to the shareholders, this case seems to me to be stronger than *Société Générale de Paris* v. *Tramways Union Co* (1). If there had been only this part of clause 103, which gives a lien and charge upon the shares for any debt incurred with the company, then it seems to me that it would have been necessary to bring in the doctrine of *Société Générale de Paris* v. *Tramways Union Co.* The doctrine of that case, which depended upon the interpretation to be put on the 30th section of the *Companies Act*, 1862, seems to me to go to this extent, that by virtue of, and upon a true construction of, that enactment, a notice given in fact to the company, is a notice to which the company need pay no regard. The notice is to have

(1) 14 Q. B. D. 424.

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no effect upon the company. What effect it may have upon the individual directors, is a matter which remains at present to be decided, and we have not in this case to consider what would be the effect of such a notice upon the personal liability of directors. But the doctrine of that case is that a notice of that kind is to have no effect on the company in the way of giving priority of charge. Therefore, if there was a charge in favour of the company against those two shareholders, and if the notice of the transaction with the bank is to have no effect as to priority, it follows, as it seems to me, that the banking company cannot maintain the action or obtain the relief which they have asked for.

But I confess that clause 103 of the articles of association seems to me to go further and to be stronger than sect. 30 of the *Companies Act*, 1862, because it seems to me that the true effect of it as between the shareholders and the company is, that the shareholders enter into a company which they know to be a trading company, and which can become their creditor by selling to them goods—for that is part of the company's business—and the contract between the shareholders and the company is not only that the company shall have a lien for any debt which the shareholders may owe to it, but also that that lien shall be the first lien available in equity. It seems to me that the meaning of the clause is that whatever may be the general rule as to priorities in equity —whatever may be the rule applicable if clause 103 had not been inserted—as between the shareholders and the company the lien of the company shall be the first. That seems to me to be the true meaning of the clause. If the Plaintiffs had not had notice of that contract between the shareholders and the company at the time when they made their advances, then the general rules of equity might apply; but if they had notice of that contract, then they made their advances subject to the existing burden upon the shares in the hands of the persons, who deposited the shares with them; that is to say, the Plaintiffs made their advance with the knowledge of this, that those who deposited the shares with them, had contracted with the company that notwithstanding any deposit of the shares with the Plaintiffs the company should have in equity the first lien and charge, although if it had not been for that contract, the Plaintiffs might have had the prior charge.

The Plaintiffs seem to me to have advanced the money upon the shares subject to such a notice as that, and, therefore, subject to the burden which lay on these shares in favour of the company as against their shareholders.

I therefore think that the decision of Mr. Justice *Field* cannot be maintained. I think that his judgment gives no effect either to the principle laid down in the *Société Générale de Paris* v. *Tramways Union Company* (1), or to the meaning of clause 103. It does not seem to me that the decision in *Hopkinson* v. *Rolt* (2) comes in question in this case. *Hopkinson* v. *Rolt* is an authority where the two conditions existing in this case do not exist, that is, where neither the *Companies Act*, 1862, sect. 30, is applicable, nor where such a stringent clause as clause 103 is inserted in the articles of association: it seems to me that clause 103 was intended to get rid of the doctrine of equitable priority with regard to the shares of the company, and to substitute for it the lien therein particularly mentioned.

BAGGALLAY, L.J.:—

I am of the same opinion. In stating my reasons for the decision at which I have arrived, I propose to refer to the case of *Easby* only; but the case of *Fletcher* is substantially the same.

It appears that *Easby* held shares in this company previously to the 6th of November, 1879. Clause 103 of the articles of association of the company, so far as is material to the present case, was as follows: "The company shall have a first and permanent lien and charge available at law and in equity upon every share of every person who is the holder thereof for all debts due from him to the company." Therefore, as between *Easby* and the company, as long as he remained a shareholder, this lien will apparently continue to exist. The company was formed for the purpose of working coal-mines, and the object was to induce coal merchants to become shareholders in the company, and this provision was inserted, that there should be a lien on any shares of any shareholder for any debt or liability which should be due from him to the company. I think that the word "permanent" is not immaterial. I construe it as meaning that there shall

(1) 14 Q. B. D. 424. (2) 9 H. L. C. 514.

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be this lien or charge upon the shares, so long as the person continues to be the holder of them, permanent from the time when he acquired the shares till the time when he parts with them: during that period all debts or liabilities which he may incur to the company, will become a charge on the shares. That is one of the essential conditions of the company, and in this manner the present case is distinguished from *Hopkinson* v. *Rolt* (1). In that case the subject-matter of the mortgages was leasehold and freehold property, not subject to any particular charge, and there was a first mortgage for the then advanced sum and further advances, there was a second mortgage, and there was a further advance, but after the date of the second mortgage. The decision in that case was, no doubt, the decision of Lord *Campbell* and Lord *Chelmsford* adversely to the view taken by Lord *Cranworth;* but it is a binding decision, and we shall be bound by it in such cases as come within its general principles. But, in my opinion, clause 103 takes this case out of the operation of *Hopkinson* v. *Rolt.* In this case the holder of the shares on the 6th of November, 1879, deposited them with the banking company to secure loans, and on the 13th of November notice of these deposits was given to *Briggs & Co.*, and that notice was afterwards acknowledged. There is no question about the notice having been given. But I am of opinion that that notice was in no way operative as regarded the rights of the company. I think it immaterial to consider what the effect of such a notice might have been as to the question of order and disposition in the event of bankruptcy, or in the event of a question arising between the assignee or mortgagee of the shareholder and the trustee in bankruptcy. But in the case of the *Société Générale de Paris* v. *Tramways Union Company* (2), this appears to have been decided, that whatever may have been the liabilities of the directors individually, the company come under no liability by the service of such a notice as this. The Judges who delivered their opinions, expressed their views in different language, but all concurred in this, that the company itself in that case came under no liability. I think that the difference in the views as to the possibility of the directors being liable is very well represented in the head-note of

(1) 9 H. L. C. 514. (2) 14 Q. B. D. 424.

the report in that case; but we are not considering now what may be the liability on the part of the directors, but only what is the liability on the part of the company. I think that that case has clearly decided that such a notice as that with which we are now dealing, would not be binding or operative on the company; in other words, that the principle supposed to be enunciated as regards the effect of such notices in determining the priority of equitable rights, does not extend to companies constituted under the *Companies Act*, 1862. I agree with the Master of the Rolls in thinking that this appeal should be allowed.

FRY, L.J.:—

I also am unable to agree with the learned Judge. The case was decided by him upon the principle of *Hopkinson* v. *Rolt* (1). That case, as we all know, determined that where a first mortgagee has a mortgage for further advances and receives notice of a second mortgage, he may not after that notice avail himself of his prior security for the purpose of advances made after that notice. It has been argued before us that that case does not apply to the present for two independent grounds.

In the first place it has been said that it is competent for the mortgagor and the first mortgagee to contract between themselves that the doctrine of *Hopkinson* v. *Rolt* shall not apply, and that such a contract would be good, at any rate as against a second mortgagee, who takes with notice of the contract between the mortgagor and the first mortgagee; and it is said that the 103rd article of association in this case is such a contract. Now, it would be enough for me to say upon that branch of the argument, that, without desiring to express dissent from my learned Brethren, I am not so strongly convinced as they are that the 103rd article ought to have that operation assigned to it. I feel some doubt whether, if that were the true view of the 103rd article, the words of the mortgage in *Hopkinson* v. *Rolt* possibly ought not to have had the same effect given to them; but I pass that by, because I entirely agree with them upon the second argument that has been addressed to us by the counsel for the Defendants. That argument was substantially this, that the

(1) 9 H. L. C. 514.

C. A. 1885

BRADFORD BANKING COMPANY v. BRIGGS & Co.

Fry, L.J.

company in the present case could not be affected by notice of the mortgages created by *Easby* and *Fletcher* with the bank. For that argument they rely upon the 30th section of the *Companies Act*, 1862, under which the Defendant company was incorporated. That provides that "no notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar." Now it seems to me to be plain that the words "shall be entered on the register" are not merely a direction with regard to the particular book in which notices are not to be entered, but that they imply that the company is not to be affected with such notices, and for this reason, that the register is obviously the book upon which the notices ought to be entered if they are to be receivable by the company at all. Therefore, I am bound to say that I feel great difficulty in seeing how the notices could be given to the company effectually for any purpose. Then it has been contended by the Plaintiffs' counsel that the mortgages made by *Easby* and *Fletcher* to the bank were not trusts, expressed, implied, or constructive. But I am unable to accede to that contention. It seems to me that as between *Fletcher* and *Easby* on the one hand and the bank on the other, each security was a trust and nothing but a trust, and it appears to me that the effort on the part of the bank in the present case is to turn *Briggs & Co.* into constructive trustees by force and virtue of those notices; and I understand the effect of the enactment to be that no notice of any trust shall convert the company into a constructive trustee, and therefore I think that these transactions were within the 30th section of the Act of 1862.

But then it is contended that although the company cannot receive notice of a trust as custodians of the register, they may receive notice of the trust as being themselves mortgagees. To that argument also I am unable to accede, because it will be observed that in the present case the lien or mortgage, whatever it may be called, on which the company are insisting, results from the original contract of membership, and it cannot be separated from it. It is, therefore, impossible to treat the company as if they were two distinct persons. The rights upon which they are insisting are their rights as the company against the members of the company flowing out of the original contract of

ownership, and, therefore, I think that if they cannot receive notice in one character, they cannot receive it in another.

I think, therefore, that the effect of the 30th section of the statute of 1862 is to exclude in this case the application of the doctrine in *Hopkinson* v. *Rolt* (1). In that conclusion I confess I am strongly confirmed by the decision of this Court in *Société Générale de Paris* v. *Tramways Union Co.* (2). Without adverting to the perhaps various opinions which are expressed with regard to the effect of a notice upon directors as individuals, it appears to me that every member of the Court considered that notice to the company would be immaterial for the purpose which is now in controversy. I will only refer to the language of Lord Justice *Lindley* (which appears to me to be acceded to by all the other members of the Court), when he says (3): "It is the duty of such companies"—that is, companies formed under the Act of 1862,—"to attend to proper transfers but not to notices of equitable titles, or to notices not to transfer given by persons having equitable interests, unless they have obtained or are about to apply for a restraining order under the statute 5 Vict. c. 5, or an injunction." I think, therefore, that the company in this case are unaffected by the notices which have been given to them; and the consequence is that this appeal must be allowed, and that the action must be dismissed with costs both in the Court below and in this Court.

Solicitors for Plaintiffs: *Paterson, Snow, & Co.*, agents for *Gardiner & Jeffery, Bradford.*

Solicitor for Defendants: *R. Vincent*, agent for *North & Sons, Leeds.*

(1) 9 H. L. C. 514. (2) 14 Q. B. D. 424.
(3) 14 Q. B. D. 457.

J. E. H.

C. A.
1885
Oct. 27.

HUMPHREYS *v* JONES.

[1881. H. 1954.]

Solicitor—Costs—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *s.* 2—*General Order, August*, 1882, *r.* 2, *sub-s.* (*c*)—*Partition Action—Costs of Defendants' Solicitors—Conveyancing.*

In a partition action an order was made for the sale of the estate and payment of the costs of all parties out of the proceeds. The Plaintiff, who was the owner of one-fourth of the estate, had the conduct of the sale, and his solicitor was paid his costs in accordance with rule 2, sub-sect. (*a*) of the General Order under the *Solicitors' Remuneration Act*, 1881:—

Held (reversing the decision of *Bacon*, V.-C.), that the solicitors of the Defendants, who were the owners of the other three-fourths of the estate, were entitled to be paid the costs of perusing the conveyance and obtaining its execution by their clients under rule 2, sub-sect. (*c*).

THE action in this case was brought for the partition of an estate, and an order was made by Vice-Chancellor *Bacon* for the sale of the estate and for payment of the costs of all parties out of the proceeds.

The Plaintiff, who was the owner of one-fourth of the estate, had the conduct of the sale. The Defendants, who were entitled to the remaining three-fourths, appeared by two separate solicitors. The Plaintiff's solicitors claimed costs, as the vendor's solicitors, under Part I. of Schedule I. of the Solicitors' Remuneration Order of August, 1882, and these costs were allowed by the Taxing Master.

The Defendants' solicitors claimed the costs of perusing the conveyance on behalf of their respective clients, and for obtaining the execution of the conveyances by them, on the scale laid down in Schedule II. of the Order. The Taxing Master disallowed these charges, and in his reply to the Defendants' objection gave his reasons as follows: "The Plaintiff and Defendants were tenants in common and all of them vendors. As such they are entitled to one scale charge under Schedule I. of the General Order made in pursuance of the *Solicitors Act*, 1881, and no more. On the sale they should have but one solicitor."

The Vice-Chancellor, on the matter being brought before him, affirmed the decision of the Taxing-Master, and the Defendants appealed.

Maidlow, for the Appellants :—

The question turns upon the construction of the 2nd rule of the General Order under the *Solicitors' Remuneration Act*, 1881 (1). That Order has been held to comprise business done in connection with sales under the Court as well as those out of Court: *Stanford* v. *Roberts* (2). That being so, the Plaintiff's solicitors, having the conduct of the sale, have been remunerated under sub-sect. (*a*) of that rule: and the solicitors for the Defendants claim to be remunerated under sub-sect. (*c*), according to the scale of charges in Schedule II. Under the old system there is no doubt they would have been entitled to these charges, and sub-sect. (*c*) provides that "in respect of all other business the remuneration for which is not hereinbefore, or in Schedule I. hereto, prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto." A mortgagee is entitled to his costs of joining in a conveyance: *In re Beck* (3); and, on the same principle, the owner of a share in an estate which is sold is entitled.

(1) "Rule 2. Subject to the exception aforesaid, the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any Court or in the chambers of any Judge or Master, is to be regulated as follows, namely :—"

(*a*) Applies to the remuneration of the solicitor having the conduct of completed sales, mortgages, &c.

(*b*) Applies to the remuneration of solicitors having the conduct of completed leases, agreements for leases, &c.

"(*c*) In respect of business not hereinbefore provided for, connected with any transaction the remuneration for which, if completed, is hereinbefore, or in Schedule I. hereto, prescribed, but which is not, in fact, completed, and in respect of settlements, mining leases, or licenses or agreements therefor, re-conveyances, transfers of mortgage, or further charges, not provided for hereinbefore, or in Schedule I. hereto, assignments of leases not by way of purchase or mortgage, and in respect of all other deeds or documents and of all other business the remuneration for which is not hereinbefore, or in Schedule I. hereto, prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto."

(2) 26 Ch. D. 155.

(3) 24 Ch. D. 608.

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Russell Roberts, for the Plaintiff:—

The first part of rule 2, sub-sect. (*c*), which refers to sales, mortgages, &c., only provides for the remuneration of the solicitor having the conduct of the business. The last part does not apply to business connected with sales, &c. Therefore the Appellants do not come within either part. In the present case there was no occasion for the Defendants to employ separate solicitors. They were all vendors, and the Plaintiff's solicitor represented them all. That would have been the case under the old practice: *Dixon* v. *Pyner* (1); *Dale* v. *Hamilton* (2). And under the present practice, Order LV., rule 40, recognises the same principle by giving power to the Judge to appoint one solicitor to represent all parties.

BAGGALLAY, L.J.:—

I am of opinion that this appeal must be allowed. Under the old system in similar circumstances the Defendants' solicitors would have been allowed their charges. In the present case the charges have been disallowed, and if that disallowance is proper it must be so under the *Solicitors' Remuneration Act*, 1881, and the order made in pursuance of it. That Act gave power by the 2nd section to the Lord Chancellor and certain other persons to make a general order "regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action, or transacted in any Court, or in the Chambers of any Judge or Master." Then it became a question whether the words of that section had reference to sales made under an order of the Court in an action as well as those made out of Court, and it was decided by Mr. Justice *Kay* in *Stanford* v. *Roberts* (3), that the clause applied to all sales whether made under an order of the Court or not. That decision was not appealed from, and I entirely approve of it. The introductory part of the 2nd rule of the Order, which was made in pursuance of the section of the Act, follows the words of that section, and provides that the remuneration of a solicitor in

(1) 7 Hare, 331. (2) 10 Hare, App. vii.
(3) 26 Ch. D. 155.

respect of business connected with sales, &c., and in respect of other business, not being business in any action or transacted in any Court or in the Chambers of any Judge or Master, shall be regulated as laid down in three sub-sections. Sub-sect. (*a*) relates to the remuneration of the solicitor having the conduct of completed sales and mortgages. Sub-sect. (*b*) relates to the remuneration of solicitors having the conduct of completed leases or agreement for leases; and then sub-sect. (*c*) is as follows:—[His Lordship read the sub-section.] I think this sub-section comprises all the business referred to in the introductory words of the rule which is not included in sub-sects. (*a*) and (*b*), and that it applies exactly to the present case. I am, therefore, of opinion that the Taxing Master was wrong in his decision, and that the Defendants' solicitors are entitled to the remuneration which they claim. The Taxing Master appears to have thought that the Plaintiff's solicitor acted for all parties. I do not think that is correct. The appeal must be allowed.

BOWEN, L.J.:—

I agree, and for the same reasons.

FRY, L.J.:—

I am of the same opinion.

Solicitors: *Bolton, Robbins, Busk & Co.; Chester & Co.*

M. W.

C. A.
1885
Oct. 28.

COWELL *v.* TAYLOR.

[1885 C. 1787.]

Practice—Costs, Security for—Trustee in Bankruptcy—Insolvent Plaintiff.

The Court will not require security for costs to be given by a plaintiff who sues as trustee in bankruptcy even where he is in insolvent circumstances.

Denston v. *Ashton* (1) approved.

The observations of *Pearson*, J., in *Pooley's Trustee in Bankruptcy* v. *Whetham* (2) dissented from.

JAMES HOLT, in April, 1875, entered into possession of premises at *Belthorn*, in *Lancashire*, under an agreement with the Defendant for the purchase of the property. By another agreement in September, 1875, a power of re-entry was given to the Defendant in certain circumstances. In August, 1876, the Defendant re-entered, and had ever since remained in possession. On the 26th of September, 1876, *Holt's* creditors passed a resolution for liquidation of his affairs by arrangement. *W. Hutchinson* was appointed trustee in the liquidation, and in 1882 made an unsuccessful attempt in the Court of Bankruptcy to recover the property. The Plaintiff was afterwards appointed trustee, and on the 7th of May, 1885, commenced this action for the same purpose.

The Defendant took out a summons asking that the Plaintiff might be ordered to give security for costs. It was deposed that the accounts of the estate of the liquidating debtor shewed assets to the amount only of £23. The evidence was clear that the Plaintiff personally was in such circumstances as to be unable to pay the costs of the action if they should be given against him.

The application was heard by Mr. Justice *Chitty* in Chambers. His Lordship considered himself bound by *Denston* v. *Ashton*, and dismissed the application with costs, certifying that he desired no further argument. The Defendant appealed.

(1) Law Rep. 4 Q. B. 590. (2) 28 Ch. D. 38.

McCall, for the Appellant:—

In *Malcolm* v. *Hodgkinson* (1) Lord *Blackburn* says: "Where an insolvent person is suing as trustee for another, it has long been the rule to require security for costs." In *United Ports and General Insurance Company* v. *Hill* (2) security for costs was refused, and Chief Justice *Cockburn* said that the assignee of a bankrupt could not be required to give security for costs, but there was no allegation of personal insolvency. In the case of *In re Carta Para Mining Company* (3) an insolvent petitioner for a winding-up order was required to give security for costs, and in *Pooley's Trustee in Bankruptcy* v. *Whetham* (4) Mr. Justice *Pearson* intimates a strong opinion in my favour—though security there was not ordered, there being no proof that the Plaintiff was personally insolvent. The Court of Appeal affirmed the decision on that ground, but left the case open whether security would not be ordered if the trustee was personally insolvent. The cases relied on against me are *Sykes* v. *Sykes* (5), and *Denston* v. *Ashton* (6). In *Pooley's Trustee in Bankruptcy* v. *Whetham* (7) Mr. Justice *Pearson* deals with both of those authorities, and shews that they do not proceed on a satisfactory ground. I rely on the rule laid down by Lord *Blackburn* in *Malcolm* v. *Hodgkinson*.

Farwell, contrà:—

Malcolm v. *Hodgkinson* is distinguishable from the present case. There the plaintiff, a liquidating debtor, was continuing an action not for his own benefit. It was a litigation his interest in which he had parted with. The remark of Lord *Blackburn* is explained by Vice-Chancellor *Hall* in *In re Carta Para Mining Company* as referring to the case of a person who allows his name to be used as trustee for another, such a case as *Corporation of Hastings* v. *Ivall* (8), where a person of substance sued in the name of a pauper. The trustee of a bankrupt is not a nominal plaintiff, he is in a recognised position, he stands in the shoes of the bankrupt. The bankrupt, however poor, could before his

(1) Law Rep. 8 Q. B. 209.
(2) Ibid. 5 Q. B. 395.
(3) 19 Ch. D. 457.
(4) 28 Ch. D. 38.
(5) Law Rep. 4 C. P. 645.
(6) Ibid. 4 Q. B. 590.
(7) 28 Ch. D. 38, 42.
(8) Law Rep. 9 Ch. 758.

C. A. 1885 COWELL v. TAYLOR.

bankruptcy have sued without giving security, and there is no reason why the trustee should not. A person, however poor, may sue, and he can sue none the less because other persons are to have the benefit of his success. The general rule is laid down in *Daniell's* Chancery Practice (1), that any person however poor may sue. Does it then make any difference that he sues as trustee in bankruptcy? *Denston* v. *Ashton* (2) decides that it does not. The remark of Lord *Blackburn*, which seems to tend the other way, is explained by Vice-Chancellor *Hall*, and Lord *Blackburn* cannot have intended to overrule the well-considered judgment in *Denston* v. *Ashton*.

[FRY, L.J.:—In *Denston* v. *Ashton* the plaintiff was suing for his own estate.]

In a sense he was, but the Court treats him as being in reality a bare trustee. The reason given in *Sykes* v. *Sykes* (3) is that the case of an executor stands in this respect on the same footing as that of a trustee in bankruptcy who is not to give security for costs, so the authority in support of my contention is very weighty. Looking at the case on principle the trustee is in the same position as the bankrupt.

[BAGGALLAY, L.J., referred to *Brocklebank* v. *Kings Lynn Steamship Company* (4).]

In that case the point was not argued, nor the authorities cited, the question in dispute being only whether the security should extend to future costs.

[FRY, L.J.:—I feel some difficulty as to the reason given in some of the cases, that it is the trustee's duty to collect the assets. It is not a man's duty to bring an ill-founded action.]

McCall, in reply.

BAGGALLAY, L.J.:—

This case raises a nice question, which has been very well argued on both sides, the arguments being none the worse because they were concise. It is singular that from the time of the

(1) 6th Ed. p. 84.
(2) Law Rep. 4 Q. B. 590.
(3) Law Rep. 4 C. P. 645.
(4) 3 C. P. D. 365.

decision in *Denston* v. *Ashton* (1), in 1869, this point was not raised again till *Pooley's Trustee in Bankruptcy* v. *Whetham* (2) in 1884. It appears to me that *Denston* v. *Ashton* and *United Ports and General Insurance Company* v. *Hill* (3) lay down a rule which has always been acted upon by the Court of Chancery. It is said that here we are dealing with an exception from the general rule. But the rule is that any one may sue without giving security, in any but certain excepted cases. Until lately, security was never required in Chancery unless the plaintiff was abroad, and if there were two co-plaintiffs, one of whom only was abroad, security was not ordered.

In *Sykes* v. *Sykes* (4) the circumstances were peculiar. The plaintiffs were two executors, one of whom was out of the jurisdiction, and the other a bankrupt. If the one abroad had been the sole plaintiff, security would have been ordered, if the one in *England* had been solvent it would not. It was held that the bankruptcy of the one in *England* made no difference. Again, if a trustee in bankruptcy or liquidation is the sole plaintiff, he will not be ordered to give security: *Pooley's Trustee in Bankruptcy* v. *Whetham*. But in that case an additional point was raised, whether the personal insolvency of the trustee was not a ground for ordering security. The evidence of insolvency broke down, and that point was not decided. Two propositions, then, are established —the fact that the plaintiff is a trustee in bankruptcy or liquidation is not a sufficient ground; the fact that the plaintiff is insolvent is not a sufficient ground. Here it is said you have a combination of the two, and though neither alone would be sufficient, both together will suffice. I cannot come to that conclusion. It is said that Lord *Blackburn* came to it in *Malcolm* v. *Hodgkinson* (5). He there says: "Where an insolvent person is suing as trustee for another, it has long been the rule to require security for costs." I think that this observation is correctly interpreted by Vice-Chancellor *Hall* in *In re Carta Para Mining Company* (6) as not referring to a case like that of a trustee in bankruptcy, but to the case of a person who is a bare trustee for some one else.

(1) Law Rep. 4 Q. B. 590.
(2) 28 Ch. D. 38.
(3) Law Rep. 5 Q. B. 395.
(4) Law Rep, 4 C. P. 645.
(5) Ibid. 8 Q. B. 209.
(6) 19 Ch. D. 457.

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Suppose I, having a shadowy case, assign it over to a man of straw that he may sue for my benefit, then security for costs will be ordered. Looking at *Denston* v. *Ashton* (1), and *United Ports and General Insurance Company* v. *Hill* (2), I think there is no doubt to what conclusion we ought to come. There is abundant authority in support of the view that security for costs ought not to be ordered, and the only case that seems to tend the other way, except *Pooley's Trustee in Bankruptcy* v. *Whetham* (3), has been explained.

BOWEN, L.J. :—

I agree with the Lord Justice as to the excellent way in which this case has been argued on both sides. After hearing it, I think that the line we ought to take is clear. The general rule is that poverty is no bar to a litigant, that, from time immemorial, has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another. There is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow. The two most familiar classes of cases of this kind are cases where a person has divested himself of his interest and handed it over to some one else that the transferee may sue for him, and cases where a person who has commenced a suit divests himself of his interest during the course of the suit in order that another person may carry it on for his benefit. Those are the common cases, I do not say that there may not be others. In those cases Courts of Common Law required security for costs to be given. The early cases on the subject are *Perkins* v. *Adcock* (4), *Elliot* v. *Kendrick* (5), and *Goatley* v. *Emmott* (6), which shew that security is required in the case of an insolvent who is suing as a mere nominal plaintiff for the benefit of a third

(1) Law Rep. 4 Q. B. 590.
(2) Ibid. 5 Q. B. 395.
(3) 28 Ch. D. 38.
(4) 14 M. & W. 808.
(5) 12 Ad. & E. 597.
(6) 15 C. B. 291.

party. In the present case we have to determine whether security is to be required in the case of a plaintiff who is himself insolvent and sues as the trustee in bankruptcy of an insolvent estate. Are the doors of the Court to be closed against such a plaintiff till he gives security? It seems to me that such a case does not come within the principle on which the exception from the general rule is based, nor within the definition of that exception, so far as a definition can be extracted from the language of the Courts. It cannot be said that a trustee in bankruptcy is a mere nominal plaintiff, he is the person whose statutory right and duty it is to get in the assets. Nor does he come within the mischief against which the exception is intended to guard. He is not a mere shadow, he is a person who has a duty to perform, that of getting in the estate. It is not necessarily his duty to carry on litigation, but it is his duty to do so where litigation is requisite. I think, then, that there is good sense is not requiring him to give security. Then there has been an established practice both at law and in equity to allow a trustee in bankruptcy to sue without giving security for costs. In 1869 the Court of Common Pleas, in *Sykes* v. *Sykes* (1), considered the case of an executor, and there *Bovill*, C.J., and *Byles*, *Montague Smith*, and *Brett*, JJ., clearly lay down that security for costs is never required from the assignee of a bankrupt. *Bovill*, C.J., says: "To entitle a defendant to security, he must shew not only that the plaintiff is insolvent, but also that he is suing as a nominal plaintiff, in the sense of another person being beneficially interested in the result of the action. In that case, the Court would stay the proceedings until security is given. That doctrine, however, has never been applied to the case of an executor or the assignee of a bankrupt." He goes on to say: "No authority has been or could be produced, in which security for costs has been ordered to be given by a plaintiff suing as executor or as assignee, simply on the ground that he is not in a position to pay costs." His Lordship then refers to *Anon.* (2), where the action was brought by the assignees of a bankrupt, one of whom was himself a bankrupt and the other a prisoner in *Newgate*, yet security was refused; and he shews in his judgment that the case is not within

(1) Law Rep. 4 C. P. 645, 647, 650. (2) 2 Taunt. 61.

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the principle of the exception. He not only lays down what the law is, but states his opinion that it ought to be so. The present Master of the Rolls in his judgment says: "Insolvency alone is not a ground for compelling security. But an exception has been engrafted on that rule, where the plaintiff is merely lending his name for the benefit of another person, and is therefore not the real plaintiff in the action; as, where he has assigned his interest in the debt to another. There is no authority, however, for extending that exception to the case of an executor or an assignee of a bankrupt." The same point was before the Court of Queen's Bench in *Denston* v. *Ashton* (1). The Court took time to consider their judgment, and then said that they were unable to find any authority in favour of enforcing security for costs in such a case, and expressed their concurrence in the decision of *Sykes* v. *Sykes* (2). But the matter does not rest there, for in *United Ports and General Insurance Co.* v. *Hill* (3) *Cockburn*, C.J., cites *Denston* v. *Ashton* and *Sykes* v. *Sykes* as authorities shewing that the assignee of a bankrupt cannot be called on to give security, and from that time (1869) till *Pooley's Trustee in Bankruptcy* v. *Whetham* (4) in 1884 there is no authority impeaching those cases. At first sight the observation of Lord *Blackburn* in *Malcolm* v. *Hodgkinson* (5) appears opposed to them, but that was a case clearly within the exception—the plaintiff had become a mere shadow. After beginning the action he had parted with his right in the subject-matter of it, and so became a merely nominal plaintiff. Lord *Blackburn*, than whom there has been no greater master of law or practice in recent times, there says that it is the course of the Court to require security for costs where an insolvent person is suing as trustee for another. But his words are to be understood as used *secundum subjectam materiem*, and he cannot have intended to overrule *Sykes* v. *Sykes* and *Denston* v. *Ashton*. The true explanation of his language is that given by Vice-Chancellor *Hall*.

So stands the practice at common law. Is there any different practice in equity? No authorities have been cited to shew that there is any conflict. Doubt was thrown for the first time by

(1) Law Rep. 4 Q. B. 590.
(2) Ibid. 4 C. P. 645.
(3) Law Rep. 5 Q. B. 395.
(4) 28 Ch. D. 38.
(5) Law Rep. 8 Q. B. 209.

Pearson, J., on *Sykes* v. *Sykes* (1) and *Denston* v. *Ashton* (2) in *Pooley's Trustee in Bankruptcy* v. *Whetham* (3). The Court of Appeal abstained from giving any opinion on the point, and expressly left it open. After having heard it argued, I think that, having regard to what the course of decision has been, we should be acting wrongly if we were to say that a rule which has been acted on so long ought not to be followed.

FRY, L.J.:—

I am of the same opinion. The question is determined by a long series of authorities, beginning with *Anon.* (4), which lay down that an assignee in bankruptcy is excluded from the exceptional class of cases in which a plaintiff will be required to give security for costs. That chain of authorities was unbroken till 1884, when Mr. Justice *Pearson* expressed his dissent from *Sykes* v. *Sykes* and *Denston* v. *Ashton*. We think that his doubt as to the authority of those cases was not well founded. The authorities have been considered by my learned Brothers, and I shall not go through them again, but only state that I concur in their conclusion.

Solicitors for Plaintiff: *Pritchard, Englefield & Co.*
Solicitors for Defendant: *Blachford, Riches & Wood.*

(1) Law Rep. 4 C. P. 645.
(2) Ibid. 4 Q. B. 590.
(3) 28 Ch. D. 38.
(4) 2 Taunt. 61.

H. C. J.

C. A.
1885
Oct. 29.

FARRER *v.* LACY, HARTLAND & CO.

[1882. F. 2311.]

Mortgage—Costs of Abortive Sale—Foreclosure Judgment—Personal Order for Payment—Form of Order.

On a sale by auction on behalf of a mortgagee, in exercise of the power of sale contained in his mortgage deed, the acceptance by the auctioneer, on behalf of the vendor and with his concurrence, of a cheque (which was dishonoured on presentation) in lieu of cash for the deposit is not, having regard to the common practice at sales by auction, unreasonable, and is not such an act of negligence on the part of the mortgagee as to deprive him of his right to the costs of the abortive sale.

A mortgagee being now entitled to combine in one action his right to judgment on the mortgage covenant against the mortgagor personally, with his right to foreclosure, is entitled:

(*a.*) If the amount of debt and interest is proved, admitted, or agreed to at the trial, to judgment for immediate payment of the whole amount:

(*b.*) If the amount is not so proved, admitted, or agreed to, to an account of what is due to him for principal and interest in respect thereof, and to judgment for payment of the whole amount immediately the same is certified—unless in either case the Judge in his discretion gives time.

Semble, the allowance of one month for payment from the date of the certificate is a reasonable exercise of such discretion.

In the order for personal payment the costs will be limited to such costs only as would have been incurred if the action had been brought for payment only of the debt.

Order of *North*, J., affirmed.

THIS was an appeal from a judgment of Mr. Justice *North* (1).

The facts are fully stated in the previous report. It will be sufficient to state that the action was brought in December, 1882, by the Plaintiff, who was first mortgagee of leasehold property at *Lambeth*, against *Day*, the mortgagor, and the puisne mortgagees, claiming an account of what was due to Plaintiff for principal, interest, and costs under his security, including his costs, charges, and expenses of an attempted sale on the 2nd of November, 1882, which proved abortive; payment of what was due; and foreclosure or sale of the mortgaged property.

At the trial of the action in November, 1883, it was alleged on behalf of the Defendants that there had been negligence on the part of the mortgagee-vendor by his agent, the auctioneer, in

(1) 25 Ch. D. 636.

accepting a cheque (which was dishonoured) in lieu of cash in payment of the deposit, without first inquiring into the solvency or *bona fides* of the alleged purchaser.

North, J., held that there had been no negligence on the part of the mortgagee-vendor and that he was entitled to the costs, charges, and expenses of the abortive sale, as part of the costs due under his securities. Judgment was accordingly given for the ordinary account, with the usual order, at the request of the Plaintiff, for personal payment.

The minutes as originally drawn up directed immediate payment of the amount of principal and interest covenanted to be paid under the mortgage deed with costs of the action.

The Defendant *Day* thereupon moved to vary the minutes, contending that the Plaintiff was not entitled to immediate payment but that, according to the usual form of order in foreclosure suits, a period of six months from the date of the certificate must be allowed.

On the 21st of December *North*, J., varied the minutes by directing payment to be made within one month after the certificate (1).

The judgment as varied accordingly directed:

1. An account of what was due to Plaintiff for principal and interest covenanted to be paid under his indenture, and for his costs of this action, to be taxed, &c., and a direction for payment by the Defendant *Day* within one month after the date of the certificate.

2. An account of the amount due to the Plaintiff under and by virtue of the said indenture of mortgage, and for the costs of this action, including his costs of the abortive sale in the pleadings mentioned, and of the Plaintiff's motion, such costs to be taxed, &c. And in taxing such amount regard is to be had to the amount, if any, which the Plaintiff may have received from the Defendant in pursuance of the directions hereinbefore contained.

3. Order for sale.

On the 14th of February, 1884, the Defendant *Day* served notice of appeal.

On the 21st of March, 1884, it was certified that on account (1) the sum of £8915 15*s.* 1*d.* was due for principal and interest,

(1) 25 Ch. D. 643–5.

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and £278 8*s.* 11*d.* for (taxed) costs of the action, amounting together to £9194 4*s.* 0*d.*

On the 9th of April, 1884, the Defendant took out a summons to stay execution on the certificate until the Chief Clerk had certified that there had been a good sale, and until after fourteen days notice to the Defendant; and an order was made by *North*, J., suspending execution on terms.

On the 24th of April the mortgaged property was again put up for sale and the Plaintiff became the purchaser for £10,000. On the 2nd of December, 1884, a second certificate was made by which the sum of £9030 0*s.* 8*d.* was certified to be due for principal and interest, and £690 2*s.* 9*d.* for costs, and £835 3*s.* 5*d.* for rates, taxes, and ground rent, making a total of £10,555 6*s.* 10*d.*, and leaving a deficiency of £555 due to the Plaintiff.

In January, 1885, the Defendant was ordered to give security for costs of the appeal, but did not comply with this order until August last.

Horton Smith, Q.C., and *B. Fossett Lock*, in support of the appeal:—

We submit, 1, that a mortgagee who has endeavoured to sell under his powers is not entitled to add to his costs the costs of a sale which has been rendered abortive by the improper conduct of his agent, who has accepted from a man of straw, without making any inquiry as to his solvency or authority to bid, a cheque in lieu of cash for the deposit. An auctioneer being an agent for the vendor to receive payment of the deposit "has not an unlimited authority to receive payment in any mode which he may choose; but he is ordinarily deemed intrusted with a power to receive it in money only": *Story* on Agency (1); *Williams* v. *Evans* (2); and the mortgagor cannot be made liable for costs occasioned by improper conduct on the part of the mortgagee: *Peers* v. *Ceeley* (3). On the sale of the 2nd of November, 1882, the auctioneer, instead of requiring a deposit of 10 per cent. on the price (£15,900) in cash, took a cheque for £1000 which was dishonoured. If the deposit had been paid in cash *Peach* could not without bringing an action have recovered it from the Plaintiff, who could have impounded it to answer the costs of the abortive sale.

(1) Sect. 98. (2) Law Rep. 1 Q. B. 352. (3) 15 Beav. 209.

[BAGGALLAY, L.J. :—Is a person who sells by auction bound to require any deposit at all? In some cases, on a sale of chattels for instance, no deposit is required.]

A vendor is bound to act like a reasonable man, and the custom at sales by auction is to require a deposit.

Then as to the form of the order, six months from date of certificate ought to have been allowed for payment. The effect of the *Judicature Act* has been to enable the mortgagee to combine in one proceeding judgment for personal payment in an action on the mortgage covenant, with the usual order for foreclosure: *Dymond* v. *Croft* (1); but the rules of equity will still prevail, so that the mortgagee, who holds sufficient security, is not entitled to issue immediate execution on the personal judgment, and the mortgagor does not lose his right to the period of six months for payment. This was the view adopted in *Dymond* v. *Croft* (as appears from the minutes of the order (2)), and followed in *Simmins* v. *Shirley* (3). In *Lees* v. *Fisher* (4) and *Hunter* v. *Myatt* (5), following *Grundy* v. *Grice* (6), a period of one month was allowed, but in those cases the defendant (the mortgagor) did not appear, and it was in effect admitted that the amount claimed for principal and interest was due. In *Greenough* v. *Littler* (7) a period of fourteen days only was allowed. The practice, therefore, being unsettled, we submit that the rules of equity ought to prevail. The order also is wrong in directing personal payment by the Defendant of the whole costs instead of leaving them to be borne by the mortgaged property as hitherto.

[FRY, L.J. :—That point was not taken in the Court below.]

Barber, Q.C., and *F. A. Lewin*, for the Plaintiff (the Respondent), were not called on.

BAGGALLAY, L.J. :—

When the case comes to be examined, and the facts of it are considered, the appeal appears to me to be a very idle one.

(1) 3 Ch. D. 512.
(2) Ibid. 516.
(3) Seton, 4th Ed. p. 1036.
(4) W. N. (1880), p. 12.
(5) 28 Ch. D. 181.
(6) Seton, 4th Ed. p. 1036.
(7) 15 Ch. D. 93.

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Two questions only had been raised before Mr. Justice *North*: 1. At the hearing, as to the right of the Plaintiff to the costs of the abortive sale; and 2, on motion to vary the minutes, whether, according to the contention of the Defendant, a period of six months after the date of the Chief Clerk's certificate should be allowed, or, as was contended by the Plaintiff, judgment should be given for immediate payment, or at any rate for payment within one month from the date of the certificate, as in *Lees* v. *Fisher*, before Vice-Chancellor *Hall* (1). Notice of appeal was served in February, 1884, and it is substantially an appeal against the whole of the judgment of Mr. Justice *North*.

The first objection which was raised at the hearing was that at the sale in November, 1882, the auctioneer took a cheque instead of cash for the deposit, which the Appellant says amounted to wilful default and negligence on the part of the Plaintiff, and he also complains that a deposit of less than 10 per cent. was accepted. But this was accepted actually at the request of the Appellant; and as to taking a cheque instead of cash I entirely concur with the views of Mr. Justice *North*, that this was reasonable, and in accordance with custom. I entirely concur with that view as a matter of law. Persons cannot be expected to come to sales with large sums of money in their pocket, and, moreover, I am not prepared to say that a mortgagee-vendor is bound to require a deposit at all from a bidder, for it is open to him to sell by private contract, in which case no deposit is, as a general rule, required. No doubt, the custom, which has almost the force of a rule, is to take a deposit on sales by auction, but it is an equally prevalent custom to take a cheque for the amount. So far, therefore, as the first objection is concerned the appeal wholly and entirely fails.

Upon the second objection, I think that the decision of Mr. Justice *North*, fixing a period of one month from the date of the certificate as the time for payment, in accordance with the decision of Vice-Chancellor *Hall* in *Lees* v. *Fisher*, is correct, and that one month is a reasonable time within which payment should be ordered to be made. So far as regards the common law action on the covenant the allowance of any time at all is a

(1) W. N. (1880), p. 12.

matter of indulgence: the strict form would be to make it payable immediately upon the certificate being made assessing the amount. But the Judge has a discretion to postpone the time for payment, and that discretion I think he exercised in a reasonable manner. For I altogether reject, as he rejected, the contention that the old rule of the Court, by which in foreclosure cases a period of six months was given for payment, should be followed. This objection also fails.

The remaining objection, which was not taken at the hearing, and was now raised for the first time, nearly two years after the date of the original judgment, is that the form of order for payment by the mortgagor personally of principal, interest, and costs of the action is too wide. I am not sure, as a matter of practice, how far the Taxing Master would deal with the costs of an action which, like this, combines the double form of an action on the covenant and an action for foreclosure, whether he would limit them to such as were incurred as costs of the action on the covenant, or whether he would tax the whole costs of the action. I think that the proper course to be pursued in future will be that the costs should be limited to those which would have been properly incurred had the action been one on the covenant only. In this case, however, having regard to the fact that this objection, as I have already said, has never been raised by the Defendant until now, nearly two years from the date of the judgment, I do not think that we ought to interfere with the order made by Mr. Justice *North*. The appeal therefore fails.

BOWEN, L.J.:—

The real question in this case is whether the Plaintiff, who is first mortgagee, is to be deprived of the costs of the abortive sale on the ground of some neglect on his part which disentitles him to them. The point as to the reduction of the deposit from 10 per cent. on the purchase-money to £1000, was only faintly argued, and must fail, for it was the Appellant himself who asked for the reduction to be made. Not only is it a most ungracious, but also a most untenable point to take, that the reduction of the deposit had anything to do with making the sale abortive. Then it was said, that there was default in accepting the cheque which

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was tendered by *Peach* instead of cash, and we have been referred to a well-known proposition of law—that an agent for the purpose of receiving money has not an unlimited authority to receive payment in any mode which he may choose, but is ordinarily deemed to be entrusted with a power to receive it in money only: in other words, that an agent being authorized to receive a bird in the hand is not authorized to receive a bird in the bush. But that proposition of law has nothing on earth to do with this case: the only question to be considered being whether what the Plaintiff *Farrer* did was reasonable in the case of a person who was acting in interests other than his own. He was bound to act reasonably, and to shew all care. Can it be said that it was unreasonable on his part to allow the auctioneer to do that which, although not perhaps amounting to a custom—for the evidence does not, in my opinion, establish that, nor is it necessary to decide it—yet is certainly a very common practice on sales, viz., to take a cheque in payment of the deposit, unless there is some reason in some particular case for declining to take it? Can it be said that 99 out of every 100 sales are conducted unreasonably because cheques are taken by way of payment of deposit? On the contrary, it was, I think, a reasonable thing for *Farrer* to do. Sales conducted in the ordinary way are much more likely to succeed than those which are hampered by numerous and unusual restrictions. But the argument does not stop there, for it is said that the mortgagee is not entitled to these costs because the sale had become abortive by taking *Peach's* cheque. How did that render it abortive? If payment in cash had been insisted upon here, there would have been either cash or no cash forthcoming, and if no cash the result would have been that *Peach's* offer would have been off and the sale at large again. Supposing even that *Peach* had paid cash he would have paid it as *Elliott's* money. But he was not the agent of *Elliott*, for *Elliott* repudiated his agency, and how could the auctioneers have held that money as against *Elliott*. The agent could next day have brought an action in the name of *Elliott* for the money. It is true the agent was liable to be sued for his misrepresentation, but the fund, *Elliott's* fund, would not have been there to answer for *Peach's* misconduct. Taking the cheque instead of cash therefore made no difference to

the sale; the Appellant was in no way prejudiced thereby, and this, it seems to me, is a very vexatious appeal. Upon the question as to the proper form of order, I entirely agree that it is too late for the Appellant now to raise the question, but it will be convenient for us to express our view as to the form of order which it will be convenient to adopt, and Lord Justice *Fry* has sketched out a form of such order. The essence of any such order must, I think, be to shew the distinction between the payment of principal, interest, and costs in the purely common law action on the covenant, and such a payment in an ordinary foreclosure suit. All I wish to emphasize is, that it cannot be the settled practice of the Court to postpone payment of money which is found to be due either for six months or for one month. So soon as the amount is assessed it is payable. If assessed at once, it ought as a matter of strict right to be paid at once. If there is any question as to the amount of interest payable, it is open to the creditor to waive it, and at once to exact payment of the principal. In the same way he may waive the costs. But whatever the claim, the payment becomes due immediately the amount is computed and ascertained. This, however, does not fetter the discretion of the Judge as to postponing payment in cases which call for this indulgence.

FRY, L.J.:—

Three points have been argued in this case. First it is said that the Plaintiff ought to be deprived of the costs of the abortive sale, and it is argued that the fact that the auctioneer took *Peach's* cheque made the sale abortive. That is not so: the only thing it did was to conceal for one day the fact that the sale was abortive. That was the substance of the transaction, and on this head I will only say that I agree with all that has been said by the Lords Justices.

The next objection is that the Defendant was ordered to pay principal and interest within one month from the time when the amount was ascertained, and it is said that six months ought to have been allowed. Before the *Judicature Act* a mortgagee had two rights, which were enforced in different tribunals—an action at law against the mortgagor personally, and a suit in equity

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against the mortgaged property. If he desired judgment on the covenant against the mortgagor he could have brought an action at common law, and if he succeeded he got an immediate judgment for principal, interest, and costs of that action. If he wished to foreclose his mortgage, he must have proceeded in a Court of Equity, in which a different account from that in the action at law would have been directed, and the costs of suit would have been added to his costs as mortgagee. The *Judicature Act* has enabled the two rights to be enforced together by one proceeding in one and the same Court. The Plaintiff has done so here, and has obtained an order both for payment against the mortgagor, and for an account of the amount due on the mortgage, and foreclosure. It has been contended that the result of the *Judicature Acts* has been to preclude the Plaintiff in his action on the covenant, now that it is brought in the Chancery Division, from obtaining immediate payment, and that as, by sect. 25, sub-sect. 11, of the *Judicature Act*, 1873, the rules of equity are now to prevail, payment is to be postponed for six months. No rule of equity exists that a sum immediately payable at law shall not be payable for six months, and in my judgment, if at the hearing the amount due should be proved, agreed to, or admitted, there should be an order for immediate payment, with so much of the costs only as would have been incurred if the action had been on the covenant simply. There is no obligation to postpone payment, but I think it is competent to the Judge to postpone payment for such time as he may think reasonable. Nothing that I am saying must be treated as in any way interfering with that discretion of a Judge. The strict right which the Court may, if it will, give effect to is immediate payment of the sum ascertained at the hearing.

The third point is that the judgment requires the Defendant *Day* personally to pay the costs of the action. I rather think, though I do not express an opinion upon it, that the terms of the judgment do include the entire costs. The strict right of the Plaintiff is to require the Defendant personally to pay the costs so far as they would have been incurred in an action on the covenant, leaving the costs of the foreclosure action to go into the account. I agree, however, with the Lords Justices that,

having regard to the fact that the Defendant, after nearly two years, is now raising this point for the first time, and that taxation has proceeded on the footing of the order, it would now be wrong to vary the order of the Court below.

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The following forms of orders in future cases was approved by their Lordships:—

FORM OF JUDGMENT.

THIS COURT DOTH ORDER AND ADJUDGE that the Plaintiff [*name*] do recover against the Defendant [*name*] £ , being the total of the principal sum of £ , and of £ for interest thereon at £ per centum per annum less tax to the day of [the date of this judgment], and also so much of his costs of this action as would have been incurred if it had been brought for payment only, such costs to be taxed by the Taxing Master.

If the debt and interest is proved, admitted, or agreed at the trial.

THIS COURT DOTH ORDER AND ADJUDGE that the following account be taken:

1. An account of what is due to the Plaintiff for principal and interest under the Defendant's covenant to pay contained in the indenture of mortgage dated [*or* promissory note *or as the case may be*] in the pleadings mentioned.

If the debt and interest is not proved, admitted, or agreed at the trial.

And It is ordered that the Plaintiff [*name*] do recover against the Defendant [*name*] the amount which shall be certified to be due to him on taking the said account, and also so much of his costs of this action as would have been incurred if it had been brought for payment only, such costs to be taxed by the Taxing Master.

And It is ordered that the following [*further*] accounts be taken:

In either event add—

2. An account of what is due to the Plaintiff under and by virtue of his mortgage security dated in the pleadings mentioned, and for his costs of this action, to be taxed by the Taxing Master, and in taking such account what if anything the Plaintiff shall have received from the Defendant under the aforesaid judgment is to be deducted, and the balance due to the Plaintiff is to be certified.
3. [*Remaining ordinary accounts, &c., in a foreclosure order.*]

Solicitors: *Pyke & Minchin; Duncan, Warren, & Gardner.*

F. G. A. W.

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Nov. 17.

PORRETT *v.* WHITE.

[1885 P. 2380.]

Practice—Payment into Court—Admission—Failure to answer Affidavit—Rules of Supreme Court, 1883, *Order* XXXII., *r.* 6.

The Defendant, one of the trustees of a settlement, in letters written to the Plaintiff, his co-trustee, before the commencement of this action for the administration of the trusts, admitted having received £300, part of the trust funds, and invested it in an unauthorized way. The Plaintiff, after the Defendant had appeared in the action, took out a summons to have the £300 brought into Court, and made an affidavit deposing that he had paid the money to the Defendant, and stating the admissions contained in the Defendant's letters as to its application. The Defendant did not answer this affidavit or adduce any evidence. *Chitty*, J., ordered the money into Court on the ground that the letters were a sufficient admission within Order XXXII., r. 6. The Defendant appealed :—

Held, that as the Defendant had not met the affidavit, there was a sufficient admission that the money was in his hands, and that the appeal must be dismissed.

Freeman v. *Cox* (1) approved and followed.

Per Fry, L.J., whether the letters were not a sufficient admission within Order XXXII., rule 6, *quære*.

THE Plaintiff and Defendant were the trustees of a settlement dated the 31st of October, 1881, under which the Defendant's wife was interested. In February, 1884, a correspondence took place between the Plaintiff and the Defendant, in which the Defendant asked that £300, part of the trust funds, then out on mortgage, should be placed in a bank in their joint names with a view to making a different investment of it. The £300 was accordingly in the same month placed to their joint account at a bank. In April, 1884, the Plaintiff gave an authority to the Defendant to receive the money that it might be advanced on a mortgage for which the Defendant stated that he had made arrangements. The mortgage was not given, and the Defendant not returning any answer to the Plaintiff's inquiries about the money, the Plaintiff, in June, 1885, inquired at the bank and found that it had been paid to the Defendant on the 10th of

(1) 8 Ch. D. 148.

April, 1884. The Plaintiff then wrote to ask what the Defendant had done with it. The Defendant wrote in reply, on the 1st of July, 1885 :—

"I invested the £300 by taking £200 in debentures of the *Patent Automatic Knitting Machine Company, Limited*, for which I paid £200, and £150 I put in stabling at our house, which I built last year at this cost, so the £300 has been improved to £350." In another letter of the 6th of July, the Defendant wrote to the Plaintiff: "Not only did I think you did not wish to carry on the trust, but I invested the money in the debentures in my wife's own name." In another letter of the 14th of July he stated that he took the debentures in April, 1884, and that they were in the name of his wife. After some further correspondence, in which the Plaintiff pressed the Defendant to restore the £300 to a proper state of investment, the Plaintiff, on the 26th of September, 1885, commenced this action asking that the trusts of the settlement might be administered by the Court, and that the Defendant might be ordered to replace the £300 improperly invested by him.

On the 6th of October, 1885, the Plaintiff took out a summons that the Defendant might be ordered to pay the £300 into Court. This was supported by an affidavit of the Plaintiff, which stated the above facts and made exhibits of the letters which had passed between the parties. The Defendant did not answer the affidavit, nor enter into any evidence.

On the 27th of October, 1885, the Chief Clerk of Mr. Justice *Chitty* made an order that the Defendant should within seven days after service of the order pay the £300 into Court. The Defendant applied to Mr. Justice *Chitty* to discharge this order, but his Lordship, following his own previous decision in *Hampden* v. *Wallis* (1), held that the letters were a sufficient admission on which to ground the order, and dismissed the application.

The Defendant appealed.

Ashton Cross, for the Appellant :—

The question is whether money can be ordered into Court on an admission made before suit. It turns on Order XXXII., rule 6,

(1) 27 Ch. D. 251.

C. A. 1885 PORRETT v. WHITE.

which authorizes a party to apply for an order where admissions of fact have been made "either on the pleadings or otherwise." Admissions of fact are referred to in the General Orders as made in three ways—on the pleadings—by answer to formal notice—and by answer to interrogatories. The words "or otherwise" must be taken to refer to modes *ejusdem generis* with admissions on the pleadings, *i.e.*, admissions made pending the suit.

[FRY, L.J.:—Is there any rule laid down that the admission must be after the institution of the suit?]

Not in terms, but there is no instance of the Court having acted on an admission otherwise than in the action, except Mr. Justice *Chitty's* own previous decision in *Hampden* v. *Wallis* (1). *Freeman* v. *Cox* (2) is against the applicability of the general order to the case, unless the insertion of the words "or otherwise" makes a difference.

[FRY, L.J.:—That case is strongly against you on another ground. An affidavit has been made as to the money being in your hands which you have not met.]

To order the money into Court now is deciding the case before trial.

[FRY, L.J.:—Not at all; it is only an order for interim protection of the money on the ground that there is a strong *primâ facie* case against you.]

Bardswell, contrà, was not called upon.

SIR J. HANNEN:—

Whatever doubt there might have been if the case had depended on the letters alone, the fact that the affidavit has not been answered by the Defendant brings it within the decision of the late Master of the Rolls in *Freeman* v. *Cox*. His Lordship there said that he would make a precedent, and it is one which, in my opinion, we shall do right in following.

BOWEN, L.J.:—

I am of the same opinion.

(1) 27 Ch. D. 251. (2) 8 Ch. D. 148.

C. A. 1885 PORRETT v. WHITE.

FRY, L.J.:—

I am not satisfied that this case does not come within the General Orders, and if it were necessary to decide whether there is not an admission within Order XXXII., rule 6, I should wish to consider the matter further; but I agree in deciding this case on the ground taken in *Freeman* v. *Cox* (1).

Solicitors for Plaintiff: *Jaques, Layton, & Jaques.*
Solicitors for Defendant: *Ellis, Munday, & Bartrum.*

H. C. J.

C. A. 1885 Nov. 18.

MELLOR *v.* THOMPSON.

[1885 M. 2335.]

Practice—Hearing in Private.

An appeal from an injunction to restrain the Defendant from disclosing confidential information was ordered to be heard in private without the consent of the Defendant, the Plaintiff stating that a public hearing would defeat the object of the action, and make success on the appeal useless to him.

THIS was an action for an injunction to restrain the Defendant from disclosing matters communicated to him as solicitor. An injunction was applied for before Mr. Justice *A. L. Smith* as vacation Judge. He heard the case in private and granted an injunction. The Defendant appealed, and on the appeal coming on,

A. Charles, Q.C. (*Alfred Cock*, with him), for the Plaintiff, asked that the appeal might be heard in private. He stated that in his opinion a public hearing would defeat the object of the action and render success on the appeal wholly valueless to the Plaintiff: *Andrew* v. *Raeburn* (2); *Nagle-Gillman* v. *Christopher* (3).

Millar, Q.C. (*Chitty*, with him), did not consent to the case being heard in private.

(1) 8 Ch. D. 148. (2) Law Rep. 9 Ch. 522.
(3) 4 Ch. D. 173.

C. A. 1885 MELLOR v. THOMPSON.

LORD HALSBURY, L.C.:—

As it is stated that the public hearing of the appeal would defeat the object of the action and render success in the appeal useless to the Plaintiff, I consider that we have jurisdiction to hear the case in private without the consent of the Defendant, and we make an order *in invitum* for so hearing it.

BOWEN and FRY, L.JJ., concurred.

Solicitors: *Smiles, Binyon, & Ollard; Church, Rendell & Co.*

H. C. J.

C. A. 1885 *Nov.* 23.

KILFORD *v.* BLANEY.

[1884 K. 1085.]

Will—Debts and Legacies—Charge—Exoneration of Personal Estate—Lapsed Bequest.

A testatrix devised her real estate to trustees in trust for sale, and directed them out of the proceeds to pay her funeral and testamentary expenses, debts, and legacies, and pay the residue to a class of persons. She then directed her trustees, who were also her executors, to sell her leaseholds, and if the sale moneys of the real estate were insufficient to pay her debts, funeral and testamentary expenses, and legacies, to apply so much of the proceeds of the sale of the leaseholds as should be sufficient for that purpose, and to pay the residue, or if no part was required for the above purpose the whole, of the proceeds to another class of persons. She then bequeathed to her trustees "all my personal estate," upon trust to call it in and convert it into money, and after payment of the expenses of such calling in and conversion, to pay the proceeds to the churchwardens of *C.* for charitable purposes. Part of the personal estate consisted of a mortgage debt, as to which the charitable bequest failed, and the Crown became entitled, there being no next of kin:—

Held, that there was upon the will a sufficient indication of intention that the general personal estate should be exonerated from debts, funeral and testamentary expenses, and legacies out of the real estate; and if that was insufficient, out of the leaseholds, but that this right to exoneration failed as regarded the property which went to the Crown, and that there was no distinction in this respect between the freeholds and leaseholds:—

Browne v. *Groombridge* (1), in which a direction to exonerate the general personal estate out of a specific fund of personalty was held to enure for the benefit of persons who took by lapse, not followed:—

Held, therefore, that the debts, funeral and testamentary expenses, and

(1) 4 Madd. 495.

legacies, must be apportioned rateably between the pure and impure personalty, including the leaseholds; that the real estate and then the leaseholds were to be applied in exonerating the pure personalty from its proportion of debts, &c., and that the charity took the pure personalty, subject to so much of that proportion as the freehold and leasehold estates were insufficient to satisfy, and that the Crown took the impure personalty (other than leaseholds) subject to its proportion of debts, &c.

THIS was an appeal by the Crown from an order of Vice-Chancellor *Bacon* (1).

Susannah Meere, by her will, appointed the Plaintiffs, *Kilford* and *Betteridge*, her executors. She then devised to them by name, their heirs, executors, and administrators, her freehold house in *Chertsey*, and all other her real estate, upon trust that they should sell it, and "shall out of the moneys to arise from such sale pay my funeral and testamentary expenses and debts, legacies, and duties payable thereon, bequeathed by this my will," and divide the surplus (if any) among the children of *Henry Weston*, jun. The testatrix then bequeathed various pecuniary and specific legacies, which she directed to be paid free from duty. She then directed her trustees to sell, as soon as possible after her decease, her ground rents on certain houses in *London*, and apply the proceeds in the following manner, namely, if the money to arise from the sale of the house at *Chertsey* should be insufficient to pay her debts, funeral expenses, and legacies, then to apply so much of the proceeds of the sale of the ground rents as should be sufficient for that purpose, and divide the surplus among the children of *Henry Weston*, sen., but if no part of the proceeds was required for payment of debts, funeral expenses, and legacies, then to divide the whole proceeds among those children. She then proceeded: "I give and bequeath to the said *W. Kilford* and *W. Betteridge*, their executors and administrators, all my personal estate whatsoever and wheresoever, upon trust to call in and convert into money such part thereof as shall not consist of money. And I declare that the said *W. Kilford* and *W. Betteridge*, and the survivor of them, and the executors and administrators of such survivor, shall, after payment of the expenses of such calling in and conversion, stand possessed of the

(1) 29 Ch. D. 145.

C. A. 1885 KILFORD v. BLANEY.

moneys to arise from such calling in and conversion into money, and of the money of which I shall be possessed at the time of my death, upon trust to pay over the same to the churchwardens for the time being of the parish of *Chertsey* aforesaid, upon trust to invest the same" as therein mentioned, and to apply the income in distributing coal and bread among the deserving poor of *Chertsey* at their discretion.

The ground rents mentioned in the will were leasehold.

The personal estate included a sum of £700 secured on mortgage of real estate.

The testatrix left no next of kin, so the Crown was entitled to such part of her personal estate as she had not effectually disposed of.

Vice-Chancellor *Bacon* decided that the impure personalty, the gift of which failed, was primarily applicable to the debts, funeral and testamentary expenses, legacies, and costs; that the freeholds were next to be resorted to for the purpose of exonerating the pure personalty, and that the leaseholds were to be resorted to for the deficiency. The Crown appealed.

Stirling, for the appeal:—

It is admitted on all sides that the gift to the charity of the personal estate fails so far as regards the mortgage debt: *Attorney-General* v. *Hurst* (1); and that the impure personalty goes to the Crown, subject only to the question what part of the funeral and testamentary expenses, debts, legacies, and costs it is to bear. As to this, the rule is that it bears the same proportion of them as it would have borne if the gift had taken effect: *Eyre* v. *Marsden* (2). Then I admit that the direction to exonerate the personal estate out of the realty does not apply to an interest the gift of which fails, it is only exoneration for the purposes of the will, but I contend that as regards personal estate the rule is different, and that the direction for exoneration out of the leaseholds enures for the benefit of the lapsed interest as well as of the effectually bequeathed residue. *Dacre* v. *Patrickson* (3) states the law as to exoneration out of real estate, but

(1) 2 Cox, 364. (2) 4 My. & Cr. 231.
(3) 1 Dr. & Sm. 182.

Browne v. *Groombridge* (1) shews that the rule is different as to exoneration out of a fund of personalty set apart for that purpose.

[FRY, L.J. :—What difference can there be in principle between exoneration out of real estate and out of a specific fund of personal estate? The principle that exoneration is only directed for the benefit of persons claiming under the will, applies as much in one case as the other.]

The presumption of intention is very different where a testator directs exoneration out of real estate, which, in the absence of directions, would not be liable to contribute to legacies, and where he directs it out of a fund of personalty which, in the absence of anything to the contrary in the will, would form part of the fund out of which legacies, &c., would have to be paid. The cases as to real estate have no doubt gone on the favour which in old times used to be shewn to real estate. There is no case that conflicts with *Browne* v. *Groombridge*.

[FRY, L.J., expressed a doubt whether the point had been discussed there.]

It was so patent on the facts that it could not but be present to the mind of every one, and the citation of *Waring* v. *Ward* (2), which could not have been referred to on any other question than this, shews that it was.

Hemming, Q.C., and *Bramwell Davis*, for the churchwardens :—

There is exoneration of the personal estate. *Greene* v. *Greene* (3), *Jones* v. *Bruce* (4), and the other cases cited in *Jarman* on Wills (5), shew that a charge on the real estate of all the burdens which the personal estate ought to bear, followed by a gift of "all" the personal estate, will make the real estate the primary fund for those charges. In this case, moreover, the direction to pay out of the personal estate the expenses of getting in and conversion, without referring to anything else, is a clear indication of intention that nothing else should be paid out of it. It is

(1) 4 Madd. 495.
(2) 5 Ves. 670.
(3) 4 Madd. 148.
(4) 11 Sim. 221.
(5) 4th Ed. vol. ii. p. 664.

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admitted that this exoneration is only for the purposes of the will, and does not apply to lapsed interests. The lapsed personalty, then, is not entitled to any exoneration and must be first applied.

Millar, Q.C., and *Swinfen Eady*, for the children of *H. Weston*, sen., and *H. Weston*, jun.:—

Mr. *Stirling's* second point is based solely upon *Browne* v. *Groombridge* (1). The question as to the effect of lapse is not mentioned in the judgment or in the marginal note, though it is true that the facts raised it. Even if it be treated as an authority it does not govern this case, for here the leasehold estate is only to pay so much as the real estate is insufficient to pay, and cannot be held liable to exonerate a fund which the real estate was not liable to exonerate. Then as to the main part of the case we contend that there is not in this will enough to enable the Court to say that the real estate is to exonerate the personalty. In *Bootle* v. *Blundell* (2) Lord *Eldon* says that on a comparison of all the cases which have arisen on this subject there are hardly any two in which the Court altogether agrees with itself. There is, he further says, no rule deducible from them than that there must be necessary implication that the testator intended to exonerate his personal estate, that he not only intended to charge the realty but to exempt the personalty. What is there here to shew an intention to exempt? "All my personal estate" comes to no more than "my personal estate," and it was in fact only a residuary gift, for the testatrix had already made a disposition of her leaseholds: *Brummel* v. *Prothero* (3) and *Aldridge* v. *Lord Wallscourt* (4) are very like this case, and are against exoneration; and *Hartley* v. *Hurle* (5), though not so directly in point, bears the same way.

Stirling, in reply:—

Greene v. *Greene* (6) is later than the cases which have been last referred to, and the current of recent authority is in favour

(1) 4 Madd. 495.
(2) 1 Mer. 193, 219.
(3) 3 Ves. 111.
(4) 1 B. & B. 312.
(5) 5 Ves. 540.
(6) 4 Madd. 148.

of exoneration. That the trustees and executors are the same persons makes no difference: *Michell* v. *Michell* (1); and *Webb* v. *De Beauvoisin* (2) supports the contention that the real estate is the primary fund. It is material that the testatrix gives her personal estate to trustees upon trust to convert it, and to pay it over to the churchwardens after deducting the expenses of conversion, not saying anything about debts, legacies, &c., because she considered that she had already provided for them.

LORD HALSBURY, L.C.:—

In this case the Court is performing the function which has been performed with great difficulty and with varied success for some centuries, that is, the endeavour to ascertain, not from express words but from a variety of different forms of expression, whether a will has manifested the intention to exonerate personal estate. In performing this function one is met by an artificial and arbitrary rule, owing to which words which primarily would have the effect of producing that result are not to have that operation. I should have thought, if it were *res integra*, that where a testator said that all his debts, &c., were to be paid out of his realty he meant what he said, and that this was not only an oneration of the real estate but was an exoneration of the personal estate. But whether that would or would not be the rational view it is not competent to me now to consider, because I am bound by authority not to hold the personal estate exonerated unless I also find in some other parts of the will an intention that it should be exonerated. Lord *Eldon*, in *Bootle* v. *Blundell* (3), states the rule as being "that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts; that the rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged," and he says that in order to exempt the personal estate "there must be in the will that which is sometimes denominated 'evident demonstration,' sometimes 'plain intention,' and 'necessary implication' to operate that exemption." And in *Wilkinson* v. *Adam* (4) he says that "'necessary impli-

(1) 5 Madd. 69.
(2) 31 Beav. 573.
(3) 1 Mer. 193, 219, 220.
(4) 1 V. & B. 422, 466.

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cation' means, not natural necessity, but so strong a probability of intention, that an intention, contrary to that, which is imputed to the testator, cannot be supposed." I should have thought that where we have to gather the intentions of a testator we ought to look at the whole instrument, and satisfy ourselves what intention he has expressed by it, and I am unable myself to give much effect to the heaping up of epithets importing greater certainty, irresistibility, and so forth, the only question being whether you are reasonably satisfied upon the construction of the document that the intention relied upon was the intention of the person who created the document. I am, however, in the present state of the authorities placed in this position. I am not at liberty to look at the words which charge the real estate as themselves exhibiting an intention to exonerate the personal estate. I must go beyond them and see whether there are words in the will which exhibit beyond reasonable doubt the intention of the testatrix that the personalty should be exonerated. For a long time I was under the impression that this will had fallen short, and that there was not such an intention exhibited by it, but when my attention is called to that part of the will in which the testatrix directs that her trustees are to sell and dispose of as soon as possible after her decease the ground-rents belonging to certain houses in *London*, and to apply the proceeds in the following manner, viz., "should the money to arise from the sale of my freehold house in *Chertsey* be insufficient to pay my debts, funeral expenses, and the legacies bequeathed by this my will, then to apply so much of the proceeds arising from the sale of the said ground rents as shall be sufficient for that purpose, and to divide the surplus equally between all the children of *Henry Weston*, sen.," and so forth, we must, I think, apply the test suggested by Lord Chancellor *Cottenham* in *Bickham* v. *Cruttwell* (1). We must presume "that the testator was cognizant of the rule of law; and if he knew the law at all, he must have known that he could not exonerate the personal estate from the burden of his debts, unless he so expressed himself as to lead the Court to the fair conclusion, from the language which he used, that such was the intention which he meant to express." When I find that an

(1) 3 My. & Cr. 763, 772.

express provision is made which becomes insensible if the personal estate is not to be exonerated, I am forced to the conclusion that it was the intention of the testatrix that the personal estate should be exonerated.

There remains another point, which has been argued before us with great ingenuity by Mr. *Stirling*. I must admit in his favour that I do not see how the case of *Browne* v. *Groombridge* (1), to which he has referred, could have been decided or argued as it was without the point that he has pressed upon us being before the mind of the Court—but I must say that the decision has not passed at present into such a condition of authority that we cannot venture to differ from it. It is admitted that if the personal estate is directed to be exonerated out of the real estate the exoneration ceases so far as regards any personal estate which becomes undisposed of. Why should not the same rule apply to a direction to exonerate the general personal estate out of a particular fund of personalty? I can see no reason for any distinction between the two cases. The text-books are silent upon any such distinction. *Browne* v. *Groombridge* has not been referred to as supporting it, and so far as I know the distinction between personalty and realty in that respect has never since been discussed. I am therefore not disposed to be bound by that case so as to establish what appears to me an arbitrary and unreasonable distinction.

The practical result will be, therefore, that the debts, &c., must be apportioned between the pure and the impure personal estate, including the leaseholds, and that first the real estate, and, secondly, the leasehold estate, must be applied in exoneration of the pure personalty, and the Crown will be entitled to the impure personalty, less the proportion of debts, &c., thrown upon it. The Vice-Chancellor's order, of course, must be varied accordingly.

LINDLEY, L.J.:—

In considering this case we must start with this, that we are not at liberty to treat a charge of debts, funeral, testamentary expenses and legacies on the real estate as in itself sufficient to

(1) 4 Madd. 495.

C. A. 1885 KILFORD v. BLANEY. Lindley, L.J.

exonerate the personal estate, but we must find something more to shew that the testatrix intended to throw those charges upon the real estate in priority to the personal estate. Now upon examining this will, I do not see how we are to give effect to all its provisions unless we hold that the personal estate is exonerated. I do not see how it is possible to work the clause as to the ground rents upon any other principle. The ground rents are leasehold and part of the personal estate. If the personal estate is first of all to bear the debts, funeral and testamentary expenses, what becomes of the clause which says that those expenses are to be paid out of the leaseholds so far as the real estate is insufficient to pay them. The only rational and proper method that I can see of giving effect to the whole of the clauses of the will is to hold that the testatrix has directed her personal estate to be exonerated. Therefore the debts, &c., must be apportioned between the pure personal estate and the impure personal estate.

Then the testatrix has said that the real estate and the leasehold estate are to exonerate her general personal estate. That cannot, according to law, be carried out quite as she has said because of the failure of her bequest as regards her impure personal estate. What is to be done in that case seems settled so far as regards real estate. It is to be applied in exonerating the pure personal estate, but not the impure personal estate, and Mr. *Stirling* admits that that is so.

There is another point as regards the leaseholds. Mr. *Stirling* contends that where a fund of personalty is set apart to exonerate the general personal estate it is to be applied in exonerating lapsed gifts, as well as those which take effect, and he refers to *Browne* v. *Groombridge* (1), which he contends has decided that point in his favour. It would seem that the Court must have so decided, but I am very much struck with the fact that it does not seem to have been treated as settling the law on this point. I cannot find any trace of it in any text-book, and I cannot see upon what rational principle such a distinction between personal estate and real estate can be drawn. It seems to me, therefore, that it is open for us to say that even if the Court did in that case decide the point, it never has become part of the law. I

(1) 4 Madd. 495.

agree, therefore, with the order which the Lord Chancellor proposes to make.

FRY, L.J.:—

I also find myself unable to agree with the conclusion at which the learned Vice-Chancellor arrived upon the construction of this will.

The rule is plain that in order to exonerate the personal estate you must find not merely words onerating the real estate, but words exonerating and discharging the personal estate. But it is not necessary that these words should be express. It is enough that the plain and necessary inference from the whole of the will is to create that exoneration.

In the present case the testatrix has directed her funeral and testamentary expenses, debts, and legacies, to be paid out of her realty. That will not of itself exonerate the personalty. But then she goes on to direct her trustees to sell certain leasehold property of which she is possessed, and thereout to pay so much of her debts, funeral expenses, and legacies as the real estate should be insufficient to pay. Now let us look at that direction according to each of the two theories which have been presented to us. Supposing the personal estate was not exonerated, then it remains the primary fund, and if it remains the primary fund the leasehold property, being part of it, would be exhausted before recourse was had to the real estate. Therefore the clause which is in aid of the realty only arises when the leaseholds have all been sold. Therefore we have in effect, upon that theory, a charge in aid of the freehold upon a fund which must be exhausted before the freehold can be touched. That is absurd. On the other view, if the personal estate is exonerated and the realty is the primary fund, then the charge on the leasehold is in aid of the primary fund, and that is perfectly intelligible. That appears to me sufficient in itself to shew the intention of the testatrix. But that conclusion is confirmed in my mind by another portion of the will which was more insisted upon at the bar than the part to which I have referred,—I mean the gift by the testatrix to her executors as trustees of all her personal estate, and the direction that it should be sold and that out of

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the proceeds should be paid the expenses of the calling in and conversion into money, she being entirely silent as to the payment of anything else out of that fund. That in itself, I feel, is a slight circumstance, but it is a slight circumstance which confirms in my judgment a very strong one. I think for these reasons that the decision of the Vice-Chancellor cannot be upheld.

Upon the second point I conceive that the general rule of law is that which was laid down by Vice-Chancellor *Kindersley* in the case of *Dacre* v. *Patrickson* (1). He says there (2): "It is a general rule, in the absence of any expression of intention to the contrary, that if a testator charges real estate with payment of debts in exoneration of his personal estate, and bequeaths the personal estate to particular individuals, he is held to have intended to exonerate his personal estate for the benefit only of those legatees; and, therefore, if the bequest of the personal estate fails, whether by the death of the legatees in the lifetime of the testator, or by reason of the *Statute of Mortmain*, so that the personal estate goes to other persons than those intended by the testator, those persons are not entitled to the benefit of the exoneration." That enunciation of the rule no doubt applies to cases where there is a conflict between real estate and personal estate; but in my view it is only a branch of the more general principle—that where the gift to the person intended to be benefited by the exoneration fails, the exoneration itself fails, the right to the benefit of the exoneration being in fact a part of the legacy which fails. That principle applies in my mind whether the property dealt with be realty or personalty, and I think that we should be wrong if we drew a distinction between them on the ground of a doubtful case in which the point appears never really to have been insisted upon and was not dealt with in the judgment.

I therefore agree with the conclusion that has been arrived at by the Lord Chancellor and Lord Justice *Lindley*.

Solicitors: *Beaumont & Warren; Ellis, Munday, & Bartrum; Hare & Co.*

(1) 1 Dr. & Sm. 182. (2) 1 Dr. & Sm. 187.

H. C. J.

CROZIER *v.* DOWSETT.

V.-C. B.
1885
Nov. 3.

[1884 C. 5356.]

Mortgage—Equitable Jurisdiction—Foreclosure—Costs—County Court Scale.

In an action to foreclose a mortgage for £65 18*s.* 10*d.*, where both Plaintiff and Defendant lived at the same place:—

Held, that the Plaintiff was entitled only to such costs as he would have obtained in the County Court.

Simons v. *McAdam* (1) followed.

THIS was a foreclosure action by an equitable mortgagee in possession of copyholds at *Waltham, Essex*, for £65 18*s.* 10*d.* and interest, against the customary heir of the mortgagor, the Plaintiff offering to account as mortgagee in possession.

Both parties lived at *Waltham*.

The only question was, upon what scale the costs should be taxed.

Hadley, for the Plaintiff.

Method, for the Defendant:—

The Plaintiff is only entitled to County Court costs: *Simons* v. *McAdam*.

Hadley:—In *Brown* v. *Rye* (2) Sir *George Jessel*, M.R., declined to follow that case, on the ground that the County Court Acts did not restrict a plaintiff from instituting proceedings in the Court of Chancery; and he there allowed the mortgagee his usual costs, although the mortgage was only for £50 and interest.

Method:—In that case the late Master of the Rolls was only following *Scotto* v. *Heritage* (3), in both cases the parties living more than twenty miles apart. Here they live at the same place.

(1) Law Rep. 6 Eq. 324. (2) Law Rep. 17 Eq. 343.
(3) Law Rep. 3 Eq. 212.

V.-C. B. 1885 CROZIER v. DOWSETT.

BACON, V.C. :—

In my opinion, *Simons* v. *McAdam* (1) laid down a very wholesome rule. Here, as the parties live at the same place, such an action as this could not be conducted here so easily and cheaply as in the County Court.

I make the ordinary decree for foreclosure and taxation of the Plaintiff's costs; but the costs to be taxed are not to exceed the costs in the County Court of a similar action.

Solicitors: *E. B. Randall*, agent for *Jones & Son, Colchester*; *Paterson, Snow, Bloxam, & Kinder.*

G. I. F. C.

V.-C. B. 1885 *Nov.* 6.

CLARK *v.* WRAY.

[1885 C. 312.]

Practice—Action—Specific Performance—Defence and Counter-claim—Leave to amend—Joinder of Causes of Action—Claim for Recovery of Land—New Case—Delay—Rules of Supreme Court, 1883, *Order* XVIII., *r* 2.

In an action for specific performance of an agreement to grant the Plaintiff, who was in possession, a lease of a brickfield, the Defendant delivered a defence admitting the agreement and expressing his readiness to perform it: he also counter-claimed for sums alleged to be due for rent under the agreement and labour and materials supplied to the Plaintiff in connection with the property. Three months after joinder of issue, and after notice of trial, the Defendant applied by summons under Rules of Supreme Court, 1883, Order XVIII., rule 2, for leave to amend his defence and counter-claim, and to join therewith a claim for the recovery of the land.

Summons dismissed with costs on the grounds of (1) new case, and (2) delay.

ADJOURNED SUMMONS.

This action was for the specific performance by the Defendant of an agreement dated the 9th of November, 1883, to grant a lease to the Plaintiff of a piece of land in the parish of *Rotherfield, Sussex*, then used as a brickfield, and known as the "*Horse Grove Brick and Pipe Works*," together with certain buildings, kilns, engines, machinery, and plant, for the term of ten years from the

(1) Law Rep. 6 Eq. 324.

25th of December, 1883, at the rent of £200 and certain royalties therein mentioned. The Defendant also, among other things, agreed to build for the use of the Plaintiff and his family within one year of the date of the agreement, at a cost not exceeding £250, a dwelling-house suitable for the use of the Plaintiff and convenient to the works.

No lease to the Plaintiff had been executed, but he entered into possession under the agreement. He alleged that the Defendant, though frequently requested to do so, had neglected and refused to grant the lease or to build the house referred to in the agreement, and he claimed specific performance with damages; or, in the alternative, £500 damages for breach of contract.

The statement of claim was delivered on the 9th of February, 1885.

The Defendant, by his statement of defence and counter-claim, which was delivered on the 10th of March, 1885, whilst admitting the agreement, and that the Plaintiff had entered into possession, denied that he had been requested by the Plaintiff or had neglected or refused to grant the lease or build the house, and expressed his readiness to perform his part of the agreement. He also counter-claimed for £101 by way of rent and royalties due to him on the 25th of December, 1884, under the agreement, and for £18 for work, labour, and materials supplied to the Plaintiff in connection with the property, the subject of the agreement.

By his reply and defence to counter-claim, delivered on the 31st of March, 1885, the Plaintiff denied that he had refused to pay the sums asked by the counter-claim, and alleged that the Defendant had not asked for payment until he, the Plaintiff, had given instructions for the action, and then only as to the amount for rent.

By the rejoinder, delivered on the 20th of April, 1885, the Defendant joined issue upon the Plaintiff's defence and reply.

Notice of trial was given on the 9th of June, 1885.

On the 22nd of July, 1885, the Defendant took out a summons for liberty to amend his statement of defence and counter-claim, and to join therewith a claim for the recovery of the land.

The Chief Clerk having refused to make the order, the summons was adjourned into Court.

V.-C. B.

1885

CLARK v. WRAY.

Nalder, for the summons:—

The application is made under Rules of Supreme Court, 1883, Order XVIII., rule 2, which says that "No cause of action shall unless by leave of the Court or a Judge be joined with an action for the recovery of land." By Order XXVIII., rule 1, the Court may, at any stage of the proceedings, allow either party to alter or amend his pleadings for the purpose of determining the real questions in controversy.

Chadwyck Healey, for the Plaintiff:—

First, it would be contrary to the Rules to grant the leave asked for; and, secondly, even if that were not so, this is not a case where leave should be given. The authorities are conclusive upon the point. In *In re Pilcher* (1) the Court of Appeal decided that an application for leave to join another action with an action for the recovery of land must be made before the issue of the writ: and in *Compton* v. *Preston* (2) Mr. Justice *Fry* held that the rule applied to a counter-claim as well as an original action.

In *Musgrave* v. *Stevens* (before Court of Appeal 30th Nov. 1881), the Court of Appeal, while admitting that the words of the rule were wide enough, held that a Plaintiff must make out a very special case for amendment after service of the writ. No such case is shewn here. The Defendant is attempting to make out a new case for eviction, which is not supported by a word of evidence.

Nalder, in reply:—

In re Pilcher does not apply, because in that case the writ joining an action for the recovery of land with another action had already been issued without leave, and the Plaintiff's application was therefore dismissed as being too late. In *Compton* v. *Preston* the joinder by the counter-claim had also been made without leave, and therefore the counter-claim was ordered to be excluded as embarrassing. Thus in both those cases the joinder had been wrongfully made without leave. Here no wrong step has been taken, and I am within the rules in asking for leave.

Musgrave v. *Stevens* is really in my favour.

(1) 11 Ch. D. 905. (2) 21 Ch. D. 138.

Even on the assumption that I am seeking to make a new case, I may be allowed to do so on payment of costs: *Mavor* v. *Dry* (1).

BACON, V.C., (after stating the facts above mentioned, proceeded):—

Now, the Defendant not only does not dispute the agreement upon which the action is founded, but himself admits it in express terms, and affirms that he "has always been and still is ready to grant the lease and build the house, according to the terms of the said agreement." He then by his counter-claim claims only that the Plaintiff owes him certain sums of money under the agreement for work done. Thereupon the Plaintiff replies, and then the Defendant delivers a rejoinder joining issue. Then, some months afterwards, when the action had been set down for trial, it occurs to the Defendant that he should like to present a totally distinct, new, and inconsistent case. In my opinion the practice upon this subject is clear; the rule is clear that unless the Court thinks it reasonable no such leave as is here asked for ought to be given. I think it is in the highest degree unreasonable, having regard not only to the issues between the parties, but also to the length of time that has elapsed, that this application should be granted. In my opinion the Chief Clerk was perfectly right in refusing this application. The summons must be dismissed with costs.

Solicitors for the Defendant: *Collyer-Bristow, Withers, Russell, & Hill*, for *Stone, Simpson & Son, Tunbridge Wells.*

Solicitors for the Plaintiff: *Sole, Turner, & Knight*, for *W. C. Cripps & Son, Tunbridge Wells.*

(1) 2 S. & S. 113.

G. I. F. C.

V.-C. B.
1885
Nov. 6.

In re CLARK.
CLARK *v.* RANDALL.

[1885 C. 2709.]

Will—Attesting Witness—Incapacity of Legatee—Wills Act (1 *Vict. c.* 26), *s.* 15 [*Revised Ed. Statutes, vol. viii., p.* 33]—*Substitutional Gift—Acceleration of Interests.*

A testator devised and bequeathed all his real and personal estate to his wife for life, and after her death to be equally divided between such of his children as should be living at her death: and in case of any of the above-mentioned children dying before his wife leaving children, such children were to take their parent's share. And in the event of any of his daughters being married at his wife's decease, it was his will that such proportion as they might be entitled to should be left to them and their children exclusively, and should in no way be controlled by their husbands.

At the death of the testator's widow one of his daughters was living who had several children. Her husband was an attesting witness to the will, and consequently the gift to her was void under sect. 15 of the *Wills Act*:—

Held, that the daughter's children were not to be disappointed by her disability, but took an immediate interest in her share as tenants in common.

ORIGINATING SUMMONS.

Alfred Clark, by his will, dated the 9th of August, 1873, devised and bequeathed his real and personal estate unto *Ann* his wife during her life: "And after the decease of my said wife, then it is my will that the whole of my property remaining, whether moneys, personal or real estate, goods or chattels, or otherwise, of every sort and kind, shall go to and be equally divided between such of the children of me, the said testator, as shall be living at the time of her death, in equal proportions, share and share alike; but should any of the above-mentioned children die before my said wife, leaving children behind them, then it is my will that the share of their parents at my said wife's decease shall be equally divided among the children: and in the event of any of my daughters being married at the time of my wife's decease, it is my will that such proportion as they may be entitled to as above-mentioned shall be left to them and their

children exclusively, and shall in no way be controlled by their husbands."

The testator died in 1876, leaving three children, viz. *Alfred George Clark*, *Ellen Hocking*, wife of *William Hocking*, and *Sarah Hannah Randall*, who, at the time of the execution of the will, was the wife of *William James Randall*, one of the two attesting witnesses.

The will was proved on the 23rd of February, 1876, by *Ann Clark*, the testator's widow and sole executrix. She died on the 1st of March, 1885, intestate, and shortly after her death Mrs. *Randall* took out administration *de bonis non* to the testator's estate. Mrs. *Randall* had several children, who were now living.

This summons was taken out on behalf of the said *A. G. Clark* and *Ellen Hocking*, the Plaintiffs, to have it determined whether or not the Defendant, Mrs. *Randall*, or her children, took any and what interest under the will, she being the wife of one of the attesting witnesses.

W. D. Rawlins, for the Plaintiffs:—

It is clear from the words of the 15th section of the *Wills Act* (1 Vict. c. 26) that Mrs. *Randall*, being the wife of an attesting witness, can take nothing, and the question is whether the gift to her children can be accelerated in consequence of her incapacity to take. I submit that it cannot. There is an absolute gift to the testator's children, but no gift to grandchildren, except in case of their parent's death before the testator's widow. The clause beginning "And in the event of any of my daughters being married at the time of my wife's decease" is only a qualification of or derivation from the absolute gift to the daughters; and as in the case of Mrs. *Randall* that absolute gift fails, the derivative gift must fail also.

Alexander Gordon, for Mrs. *Randall*:—

The question is covered by authority. In *Jull* v. *Jacobs* (1), where there was a gift to the testator's daughters for life, and after her death to her children equally, the daughter being the wife of one of the attesting witnesses, Vice-Chancellor *Malins*

(1) 3 Ch. D. 703.

V.-C. B. 1885 *In re* CLARK. CLARK *v.* RANDALL.

held that the daughter's children took an immediate interest, accelerated by the incapacity of the mother. The only difference between that case and the present is, that here there is a gift to the daughter with a substitutional gift to her children, whereas in *Jull* v. *Jacobs* (1) the interests were successive. But the same principle applies in both cases.

Rawlins, in reply:—

Jull v. *Jacobs* is a wholly different case from the present, as in that case there was a gift to the daughter for life, and then an independent gift to her children. The interests were successive and independent of each other. But here the gift to the children is dependent on the gift to the mother, and must fail with it.

BACON, V.C.:—

I must read this will as if either this gift to the daughter had not been in it, or being in it had been blotted out by the testator. That is what is really done by the statute. I cannot read it as a gift that failed so as to disappoint anybody who was entitled subsequently to that gift. I think, therefore, that the children of *Sarah Hannah Randall* are entitled to the share which she would have taken if her husband had not been one of the attesting witnesses to the will. They will take their mother's share as tenants in common. The costs will come out of the estate.

Solicitors: *J. & W. Maude; Kingsford, Dorman, & Co.*, for *Stallon, Sheerness.*

(1) 3 Ch. D. 703.

G. I. F. C.

V.-C. B.
1885
Nov. 16.

In re NOYCE.
BROWN *v.* RIGG.

[1885 N. 68.]

Will—Construction—Gift in Remainder—Death of Remainderman before Tenant for Life—"Entitled"—Interest "in right" or "in possession."

By a testamentary appointment a testatrix gave three copyhold houses to *E.* for life, and after his death she directed the houses to be sold and the proceeds "to be equally divided amongst" her three nephews and niece, "but should either of my said nephews or niece die before they are entitled to the property, leaving issue, I give the share of him or her so dying to his or her child or children."

All the remaindermen survived the testatrix, but three of them predeceased *E.*, leaving children living at his death:—

Held, that "entitled," meant entitled "in possession," and that therefore the shares of the three deceased remaindermen did not pass to their legal personal representatives, but to their children.

Commissioners of Charitable Donations v. *Cotter* (1) distinguished.

SARAH NOYCE, the wife of *John Noyce*, by her will, dated the 13th of November, 1854, and made under a testamentary power of appointment given to her by a settlement, gave three copyhold houses in *Richmond, Surrey*, to her husband for life, and after his death to her nephew, *Edward Brown*, son of her brother, *Edward Brown*, for life: and after his death, she directed the houses to be sold, and the proceeds "to be equally divided amongst" her three nephews *Edward*, *Joseph*, and *John Brown*, sons of her late brother *Charles Brown*, and her niece, *Mary Ann Buono*, for her separate use, "but should either of my aforesaid nephews or niece happen to die before they are entitled to the property, leaving issue, I give the share of him or her so dying to his or her child or children, share and share alike."

The testatrix died on the 24th of April, 1856. Her husband, *John Noyce*, the first tenant for life, died on the 11th of March, 1860. *Edward Brown*, the second tenant for life, died on the 28th of January, 1884, whereupon the copyholds became saleable under the will. They were accordingly sold by auction, but

(1) 1 D. & War. 498.

V.-C. B. 1885 *In re* NOYCE. BROWN *v.* RIGG.

the sales were not completed in consequence of a doubt as to who were the persons beneficially entitled to the property.

The testatrix's three nephews and her niece, the remaindermen named in the will, all survived her. Three of them, namely, the two nephews *Edward* and *Joseph* and the niece, *Mary Ann Buono*, predeceased *Edward Brown*, the second tenant for life, but left children living at his death. The other remainderman, *John*, survived the second tenant for life, and was now living.

The question was whether the word "entitled" in the will, meant "entitled in right," or "entitled in possession": if the former, then the shares of the remaindermen who predeceased the second tenant for life passed to their legal personal representatives: if the latter, then the shares which those remaindermen would have taken had they been living at the death of the second tenant for life passed to their children under the substitutional gift.

To have this question decided, the legal personal representative of one of the deceased remaindermen brought this action against the children of the deceased remaindermen, and the surviving remainderman, *John Brown*, claiming a declaration that according to the true construction of the will the word "entitled" meant "entitled in right," and that consequently the three deceased remaindermen became, upon the death of the testatrix, absolutely entitled, subject to the two life estates, to three equal fourth shares of the proceeds of sale of the copyholds, and that such shares were not divested by the deaths of those remaindermen in the lifetime of the second tenant for life leaving issue; or an alternative declaration as to the rights of the parties.

F. Stallard, for the Plaintiff:—

I submit that "entitled" means "entitled in right," the term being referable to the death of the testatrix, and not of the survivor of the two tenants for life: *Commissioners of Charitable Donations* v. *Cotter* (1) before Lord Chancellor *Sugden*. In *Henderson* v. *Kennicot* (2) Vice-Chancellor *Knight Bruce* held himself bound by that decision. *Turner* v. *Gosset* (3) is, however, an

(1) 1 D. & War. 498; 2 D. & Wal. 615.

(2) 2 De G. & Sm. 492.

(3) 34 Beav. 593.

authority the other way, but the former decisions are to be preferred.

If the testatrix had meant entitled "in possession," she would have used some such expression as "payable," or "divisible."

Gatey, and *A. D. Stallard*, for the Defendants, were not called upon.

BACON, V.C.:—

I entertain no doubt as to the construction of this will. With the greatest respect for the authorities, and with the highest esteem for the late Sir *Edward Sugden*, this case is, in my opinion, plainly distinguishable from those that have been cited.

In the case before Sir *Edward Sugden* the life interest was not created by the testator: it was already subsisting under certain articles of agreement. Subject to that life interest a power of appointment was given over the fund, and the donee made an immediate title to it by the mere exercise of his power. But here the intention of the testatrix is plain. She meant that during the continuance of the life interests created by her no one should be entitled to the *corpus*, but that on their expiration a title should arise. She first of all takes care to provide for certain tenancies for life, and upon the termination of those estates, she directs the property to be sold and the proceeds to be divided as follows: [His Lordship read the gift in remainder, and continued:—] As I read the will, and the construction of the words the testatrix has used, without referring to any rule—for I will not permit any supposed rule to interfere with the construction of the words of a will—the testatrix says, in effect, "the time will come when *Edward* must die: when that time comes the property shall be sold;" and she then looks about to see who shall become entitled in that event. The property could not have been sold in the lifetime of the tenants for life: nothing could have been taken during that time by an execution creditor of any one of the remaindermen; and it is impossible to say that anyone could have any title to the property until the death of *Edward Brown*.

I therefore hold that "entitled" means "entitled in possession;" and, consequently, that the children of the three remain-

V.-C. B. 1885 *In re* Noyce. Brown v. Rigg.

dermen who predeceased *Edward Brown*, the second tenant for life, are entitled to the shares which their parents would have taken if they had been living at his death.

Solicitors: *Trollope & Winckworth*, agents for *Johnson & Johnsons, Stockport*, and *Smith & Burrell, Richmond, Surrey.*

G. I. F. C.

V.-C. B. 1885 Nov. 20.

In re EMPEROR LIFE ASSURANCE SOCIETY.

Company—Winding-up—Petition—Provisional Liquidator, Appointment of—Resolution for Voluntary Winding-up—Confirmatory Resolution—Commencement of Winding-up.

On the day of the presentation of a creditor's petition for the compulsory winding-up of a company a provisional liquidator was appointed under that petition. A meeting of the company was afterwards held, at which a resolution was passed for a voluntary winding-up, and at a subsequent meeting this resolution was confirmed. A supervision order was then made on the petition:—

Held, that the winding-up must be treated as having commenced at the date of the confirmatory resolution, and not at the date of the appointment of a provisional liquidator.

On the 22nd of September, 1885, a creditor's petition was presented for winding up the *Emperor Life Assurance Society, Limited*, and on the same day an order was made under that petition appointing a provisional liquidator.

On the 5th of October, 1885, a meeting of the shareholders was held, at which a resolution was passed for a voluntary winding-up.

On the 7th of October the petition came on for hearing before the Vacation Judge, who made a compulsory order and continued the provisional liquidator, but directed that if the resolution to wind up voluntarily was confirmed, a supervision order should be drawn up in place of the compulsory order.

At a meeting of the shareholders on the 21st of October, 1885, a resolution was passed confirming the previous resolution for a voluntary winding-up, and on the 24th of October a supervision order was made on the petition.

The question was, whether the winding-up was to be deemed

to have commenced on the 22nd of September, the date of the appointment of the provisional liquidator, or on the 21st of October, the date of the confirmatory resolution. The question was raised by a motion by a policy-holder for an order directing the liquidator to admit him to prove for the value of his policy, such value to be ascertained as at the date of the confirmatory resolution.

Marten, Q.C., and *Mulligan*, for the motion:—

The winding-up must be deemed to have commenced at the date of the confirmatory resolution: *Weston's Case* (1).

F. B. Palmer, for the liquidator:—

I only desire the direction of the Court.

In *Ex parte Bradshaw* (2), the late Master of the Rolls held that where a provisional liquidator had been appointed, the winding-up must be taken to have commenced at the date of that appointment. The question, therefore, in the present case is, whether the liquidator should adopt that decision or the decision in *Weston's Case*.

The former case appears to have had reference solely to the rights of debenture holders.

BACON, V.C.:—

I cannot entertain the slightest doubt upon this point. What are the rights that exist as between debenture-holders and the company upon whose property they have a charge, is another matter: that was the question which arose in the case before the late Master of the Rolls, but I do not consider that case to have any application to the case before me. The plain sense and justice of the thing is beyond all question. Under the *Winding-up Act* a joint stock company has it in its power to pass a resolution for a voluntary winding-up. It does that by means of a resolution at a first meeting, but such a resolution is wholly inoperative unless it is confirmed at a second meeting; and therefore it is only at the second meeting that the operation of the winding-up can be said to commence.

(1) Law Rep. 4 Ch. 20. (2) 15 Ch. D. 465.

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When the second meeting has given full force and effect to the intention of the first meeting, then it is that the act of winding up is done, and from that moment the winding-up proceeds. It is impossible to refer the winding-up to any other date, or to say that it is the appointment of the provisional liquidator—which is a piece of machinery merely—from which the winding-up in fact commences. When the voluntary winding-up is confirmed, the operation is effectively done and it has commenced. Here the date of the confirmatory resolution of the second meeting is no doubt the date when the winding-up began: it took effect then and did not exist before: it commenced immediately thereafter and thereupon. The question is, in my opinion, beyond doubt. I therefore make an order in the terms of the notice of motion. The costs of all parties will come out of the assets.

Solicitors: *F. J. Mann; W. Sturt.*

G. I. F. C.

In re DE ROS' TRUST. HARDWICKE *v.* WILMOT.

[1885 D. 1505.]

KAY, J.
1885
Oct. 28.

Marriage Settlement—After-acquired Property of Wife—Covenant by Husband that he and his Wife would settle—Recital of Agreement for Settlement—Property afterwards acquired by Wife "for her separate use."

A marriage settlement contained a recital of an agreement that all such personal estate above a certain value as should during the coverture be given or bequeathed to or otherwise vest in the wife should be settled, and that the husband should enter into the covenant in that behalf thereinafter contained. The corresponding operative part of the deed was a covenant by the husband alone (without the usual words: "It is hereby agreed") that he and his wife would settle such property, and that until such settlement the husband and wife should stand possessed of the same upon the trusts of the settlement.

The wife as well as the husband executed this settlement, and during the coverture property was given to the wife for her separate use:—

Held, that the operative words were sufficiently ambiguous to enable the Court to look at the recitals, and that on the whole instrument the wife's after-acquired separate property was bound by the covenant.

ADJOURNED SUMMONS.

An indenture of settlement dated the 14th of February, 1863, and made upon the marriage of *Charles Philip* Viscount *Royston* with Lady *Sophie G. R. Wellesley* (afterwards Viscountess *Royston*), contained recitals that Lady *Sophie* was entitled under an appointment made by her mother, Countess *Cowley*, and subject to her mother's life interest, to a one-fifth share of the real and personal estate of Lady *de Ros*, deceased; that "upon the treaty for the intended marriage it was arranged and agreed" that this share should be settled; and further, "that all such moneys or other personal estate except jewels or ornaments of the person as should at any time or times during the said intended coverture be given or bequeathed to or otherwise vest in the said Lady *Sophie G. R. Wellesley* or the said *Charles Philip* Viscount *Royston* in her right, in full and absolute property, and which should exceed in amount or value the sum of £200 at any one time, should also be assigned and settled upon the trusts hereinafter declared or referred to, and that the said *Charles Philip* Viscount

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Royston should enter into the covenant in that behalf hereinafter contained;" and by the operative part of the indenture the said one-fifth share was settled, and Viscount *Royston* entered into the following covenant:—

"And in further pursuance of the said recited arrangement and agreement, and for the considerations hereinbefore expressed, he, the said *Charles Philip* Viscount *Royston*, doth hereby for himself, his heirs, executors, and administrators, covenant and agree with and to the said" trustees, "their executors, administrators, and assigns, that in case the said intended marriage shall be solemnised, and any sum or sums of money, stocks, or funds, or other personal estate, except jewels or ornaments of the person, exceeding in amount or value the sum of £200 at any one time, shall at any time or times during the said intended coverture be given or bequeathed to or in any manner vest in the said Lady *Sophie G. R. Wellesley*, or in him the said Viscount *Royston* in her right, then and in that case, and so often as the same shall happen, they, the said Viscount *Royston* and Lady *Sophie G. R. Wellesley* respectively, or their respective executors or administrators, shall and will at the costs and charges of the said trust estate do and execute all such acts, deeds, and assurances as shall be necessary for properly assuring or transferring such property unto or vesting the same for all the right and interest of the said Lady *Sophie G. R. Wellesley*, or of him the said Viscount *Royston* as her husband therein, in the said" trustees, "or the survivors or survivor of them, or his executors, administrators, or assigns, so and in such manner that the same may be held by them or him upon and for such of the trusts, intents, and purposes, and with, under, and subject to such of the powers, provisoes, declarations, and agreements hereinbefore expressed and contained of and concerning the said premises hereinbefore settled or intended so to be as shall be then subsisting or capable of taking effect, and that in the meantime and until such settlement as aforesaid shall be made, the said Viscount *Royston* and Lady *Sophie G. R. Wellesley* respectively, and their respective executors, administrators, and assigns, and all other persons in whom the said premises hereby covenanted to be settled as aforesaid shall be vested, shall stand and be possessed of the same upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes,

declarations, and agreements hereinbefore mentioned or referred to."

This indenture contained no actual covenant by Lady *Sophie* to settle her after-acquired property, nor any agreement by her with reference thereto, except such as was comprised in the recitals, but it was executed by her as well as by Viscount *Royston*.

The marriage was duly solemnised on the 16th of February, 1863; and during the continuance of the coverture Lady *Cowley* appointed further shares in Lady *de Ros*' estate in trust for Viscountess *Royston* (now Countess of *Hardwicke*), her executors, administrators, and assigns, "for her separate use," subject to her (Lady *Cowley's*) own life interest, and in addition to the one-fifth share already appointed.

Lady *Cowley* died on the 21st of May, 1885, and the question upon this summons was whether these further shares were payable to the Countess of *Hardwicke* upon her separate receipt, or were bound by the provisions in the marriage settlement as to after-acquired property, and were consequently payable to the trustees of that instrument.

Hastings, Q.C., and *Nalder*, for the Countess of *Hardwicke*:—

In this settlement the covenant to settle after-acquired property is by the husband alone that he and his wife respectively will settle, and the usual agreement is omitted in the operative part of the deed. This covenant cannot relate to property given to the wife for her separate use, over which he has no power, and in which he has no interest. There is no covenant whatever by the wife, nor anything to bind her as to this property, and the operative part of the deed being clear the recital cannot control it: *Dawes* v. *Tredwell* (1).

They were then stopped by the Court.

Farwell, for the trustees of the settlement:—

First, this is a covenant by a husband that he and his wife will settle, and it is contained in a deed which was executed by the wife. It accordingly comes within the principle of the decision in *Lee* v. *Lee* (2), that a covenant by *A.* in a deed to which *B.* is

(1) 18 Ch. D. 354. (2) 4 Ch. D. 175.

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a party, to settle *B.'s* estate, binds *B.*; so that, as was said by the late Master of the Rolls in that case (1): "Even if it is treated as a covenant by the husband alone, yet it is for valuable consideration and with the assent of the wife, and she is therefore bound."

Secondly, even if this is not so, there is such an ambiguity in the operative part of the deed as to entitle the Court to look at the recitals, and one of them is of an agreement in terms quite wide enough to include this property.

M. G. Davidson, for the trustees of Lady *de Ros.*

Hastings, in reply:—

The agreement in *Lee* v. *Lee* (2) was not in general terms, but that the husband should settle certain property specifically described; and it was upon this (which distinguishes that case from the present) that that decision turned. In *Young* v. *Smith* (3), where the settlement contained a recital of an agreement that the after-acquired property of the wife should be settled, and the operative part was a covenant by the husband alone, without the usual words "it is hereby agreed," it was held that the covenant was not controlled by the recital, and was not binding on the wife. Again, in *Ramsden* v. *Smith* (4), where the marriage settlement contained an agreement and a covenant by the husband that if any personal property should devolve to or vest in the wife, the husband should do or join with the wife in doing all acts necessary to settle it, it was held that a legacy left to the wife for her separate use did not come within the covenant and agreement; and *Kindersley,* V.C., remarked that to hold that it did would involve the absurd consequence that "you would make the wife bind herself by covenant or by agreement that the husband shall do an act which she has no power to make him do." It is clear that in this case the trustees could not sue the wife at law upon this covenant.

[KAY, J.:—Is there any case in which the covenant was a covenant by the husband that he and his wife shall settle?]

(1) 4 Ch. D. 179.
(2) Ibid. 175.
(3) Law Rep. 1 Eq. 180.
(4) 2 Drew. 298.

Kane v. *Kane* (1) is such a case, but there the covenant excluded such estate as should be otherwise settled previously to devolving, and there it was held that a legacy given to the wife for her separate use was not within the covenant. In the present case there is only the covenant by the husband, for surely the mere fact of the wife having executed the deed cannot bind her as to the separate estate if there is nothing else to do so.

Farwell referred to *In re Allnutt* (2).

Kay, J.:—

The first question in this case is whether the personal property which came to the wife during her coverture for her separate use is within the terms of the covenant to settle after-acquired property contained in the settlement. Now the covenant is in terms by the husband alone, and it is not accompanied by the usual words "and it is hereby agreed and declared," which would make it a covenant by the wife also; but, after beginning with the words "and in further pursuance of the said recited arrangement and agreement," the husband covenants with the trustees "that in case any sum or sums of money, stocks or funds, or other personal estate" (with certain exceptions) "shall at any time or times during the coverture be given or bequeathed to or in any manner vest in Lady *Sophie Wellesley* or in the said Viscount *Royston* in her right, then"—something is to be done. I pause there for a moment to observe that the words "shall in any manner vest in" the wife or in the husband in her right are wide enough to include personal property given to or vested in the wife for her separate use; for there is a distinction between vesting in the husband in her right and vesting in her alone, and unless it were given to her for her separate use it would vest in him in her right. The rest of the covenant shews what is to be done in "that case, and so often as the same shall happen," and this is that the husband and the wife respectively are to do and execute all acts and deeds necessary for properly assuring or transferring such property unto or vesting the same "for all the interest of Lady *Sophie* or of Viscount *Royston* as her husband therein," in

(1) 16 Ch. D. 207. (2) 22 Ch. D. 275.

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the trustees of the settlement. Now an ambiguity arises from the circumstance that the wife does not join in the covenant. She does not, in so many words, covenant that she will do this, but the husband covenants that both he, if he has any interest, and she, according to her interest, shall settle; and thus there is an ambiguity as to whether the covenant of the husband was or was not intended to refer to property which should vest in the wife during the coverture for her separate use. And if there be any ambiguity, then I am entitled to look back at the recital in the settlement as to what was arranged and agreed upon the treaty for the intended marriage.

[His Lordship here read the recital, and continued:—]

It seems to me that that recital makes it impossible to doubt that the covenant that she should settle refers to property that might come to her for her separate use; so that if she does not settle it, it might be said that there is a breach of covenant.

Now no case has been cited to me, nor am I aware of any, in which a covenant by the husband in terms like this, that the wife as well as himself should make the settlement, has been held not to be binding on the wife.

In *Young* v. *Smith* (1), which has been referred to, the covenant was by the husband for himself and his heirs that if at any time during the coverture any real or personal estate of the value of £300 should descend or devolve to or vest in the wife, or the husband in her right, then the husband should execute, or cause or require to be done and executed, all such acts as should be necessary to effect the settlement, but it was not in terms that the wife should make the assignment, and that is the distinction between *Young* v. *Smith* and the present case. I should observe, before parting with *Young* v. *Smith*, that there the covenant was only by the husband for acts to be done by him, or such acts as he should cause or procure to be done (which I have no doubt means only the acts of persons who were bound to obey his order, like trustees for him) and being on the face of it clearly a covenant that he would assign such property as he could assign, it could not possibly refer to property which belonged to the wife for her separate use, and so the Master of the Rolls, according to

(1) Law Rep. 1 Eq. 180.

the usual rule in cases where there is no ambiguity, refused to look at the recital.

The only other case I think it necessary to refer to now is *Dawes* v. *Tredwell* (1). There the decision was similar to that in *Young* v. *Smith* (2), and the covenant was in these terms: "It is hereby agreed and declared," and *Dawes* covenants, that if at any time any real or personal property should descend, or devolve, or vest in the intended wife, or the husband in her right, to the amount of £200, then and in such case the husband would immediately thereupon "make, do, and execute, or cause and procure to be made, done, and executed, and join and concur in" all conveyances, and so on. In that case, again, there was no covenant that the wife would settle; and the distinction which the Master of the Rolls draws in that case is this (3): "Anything more absurd than to hold it a covenant by all of them could not be imagined. Suppose you had these words, 'Provided always, and it is hereby agreed and declared between and by the parties to these presents that the said *A. B.* shall pay £5000 to the said *C. D.* on the 6th of January next,' it would be absurd to say that this amounts to a covenant by *C. D.*, the recipient of the money, that *A. B.* shall pay him, as well as a covenant by *A. B.* that he will pay him. If, therefore, we find that no act is to be done except by one of the parties, these words only amount to a covenant by that one party with the others." There is the distinction. Here I find an act is to be done, not by the husband only, but by the wife, and that act seems to me clearly an act by which she is to settle any property that may come to her even if it is limited to her for her separate use.

I illustrated that during the argument in this way. Suppose that she had joined in this covenant, could there be any sort of doubt that the words are large enough to include property coming to her for her separate use? Most certainly not. Then the only reason for supposing that the covenant does not refer to such property, is that she does not in terms join in it. But when I find the covenant is in the form that she is to convey or assign, there being a possible ambiguity, I have a right to look back to

(1) 18 Ch. D. 354. (2) Law Rep. 1 Eq. 180.
(3) 18 Ch. D. 359.

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the recital to see what was really intended, and looking at the whole of this deed, I have no kind of doubt that the intention of the parties was that all personal property above the stipulated value which should come to her during the coverture, even though it should come to her for her separate use, was to be settled like the rest of the property comprised in the deed.

Then the intention of all parties, and the meaning of this covenant being, as I understand it, that the lady as well as the intended husband should execute all necessary acts and deeds for the purpose of transferring the property to the trustees, what difference is there between this case and *Lee* v. *Lee* (1)? In *Lee* v. *Lee*, by an ante-nuptial agreement, *Arthur Lee* agreed that he would settle such share as his wife might take in certain property, either by appointment, or in default of appointment, in a particular way, and that agreement was signed by all parties including the wife. This settlement which I have before me is executed by the wife. She is a party to an instrument upon the face of which I can read, as it seems to me, an agreement that she will execute whatever deed may be necessary in order to assign this property to the trustees on the trusts of the settlement.

Now, why should not that be binding upon her? I confess I do not see, and it seems to me that it is. It is very plain law that if you can find that which amounts to an agreement within the four corners of a deed, it is as binding as a covenant expressed in the most apt possible words. There may have been a defect of expression in the mode in which this covenant is worded. No doubt it would have been more proper, according to the view which I take, that the wife should in terms have joined in the covenant. But she has executed a deed which contains a covenant by the intended husband that she is to be a party to the conveyance actually to be made, and if the case rested only on that, it seems to me that she ought to be held to be bound.

But any kind of ambiguity which might otherwise exist is, I think, removed by the closing words of this covenant, which amount to this, that both the husband and the wife, or either of them, according to the nature of the property to be settled, shall be a trustee thereof until the settlement is made. Now, why am

(1) 4 Ch. D. 175.

I to hold that binding on the husband only? No doubt it is in the form of a covenant by the husband that it shall take effect, but, as I said before, that covenant is in a deed executed by the wife, the purpose and intent of which with reference to this particular point seems to me very clearly to be to effect the settlement of any property which might come to the wife for her separate use if it came to her during the coverture. Accordingly, I think that for both reasons this property is bound by the deed, and the lady is bound to make a settlement of it by assigning it to the trustees.

I cannot, therefore, order it to be paid to her, but I will make a declaration that the sum mentioned in the summons is subject to the trusts of the settlement, and the costs of all parties must come out of the fund.

Solicitors: *Collyer-Bristow, Withers, Russell & Hill; Ellis & Ellis; Davidson, Burch & Co.*

W. W. K.

PEARSON, J.
1885
Oct. 27.

In re MOSS.
LEVY *v.* SEWILL.

[1882 M. 1253.]

Mortgagor and Mortgagee—Payment off of Mortgage—Interest in Lieu of Notice—Order for Payment out of Fund in Court—Delay in Completion of Order.

One of the beneficiaries under a will mortgaged her interest in the testator's estate. She gave the mortgagees six months' notice to pay off the mortgage on the 1st of July, 1885, and on the 20th of May, 1885, an order was made in an action to administer the estate, on the application of the beneficiaries and in the presence of the mortgagees, which directed (*inter alia*) payment to the mortgagees, out of funds in Court standing to the credit of the mortgagor, of the mortgage debt, with interest up to the 1st of July, 1885. Owing to delay in the completion of the order the payment could not be made on the 1st of July, and on the 2nd of July the mortgagees took out a summons, claiming six months' additional interest in lieu of a fresh six months' notice to pay off the mortgage. On the 20th of July the order was completed, and on the 21st of July the mortgagees took the sum mentioned in the order out of Court:—

Held, that the mortgagees were only entitled to additional interest from the 1st to the 21st of July, on the ground that, by accepting the order, they assented to payment out of the fund in Court subject to all the contingencies to which the completion of the order might be subject.

SUMMONS by mortgagees raising questions as to the amount of interest which they were entitled to receive on the redemption of their mortgage.

The action was brought for the administration of the estate of *Barnett Moss* deceased. Under his will Mrs. *Curtis*, the wife of *L. B. Curtis*, was entitled in reversion, subject to a life estate given by the will to her mother, Mrs. *Campbell*, to one sixth share of a sum of £3000 bequeathed by the will, and also to one-sixth share of one-sixth of the residuary estate of the testator.

On the 9th of November, 1880, Mr. and Mrs. *Curtis* executed a mortgage of her interest under the will to Messrs. *Brown & Moor*, to secure the repayment of an advance of £1100. The mortgage deed provided for the payment of interest at the rate of 7 per cent. per annum, half-yearly, on the 9th of May and the 9th of November, but there was a covenant by the mortgagees

that they would accept interest at the rate of 6 per cent., in case the half-yearly interest should be paid on the day appointed or within twenty days thereafter. There was also a proviso that nothing in the deed contained should deprive the mortgagees of the benefit of the rule of Equity entitling a mortgagee to notice or additional interest on being paid off.

The administration action was commenced in 1882. Mrs. *Campbell*, the tenant for life, died in November, 1884. On the 31st of December, 1884, a letter was written by the mortgagors' solicitor to the mortgagees, which was afterwards held by Mr. Justice *Pearson* in Chambers to be a valid notice to pay off the mortgage on the 1st of July, 1885. No interest had been paid by the mortgagors since the 9th of May, 1884. The action was heard on further consideration on the 14th of January, 1885, and, in pursuance of the order then made, certain funds in Court were carried over to the credit of the legacy of £3000 bequeathed for Mrs. *Campbell* and her children, and certain other funds were carried over to the credit of the one-sixth share in the testator's residuary estate bequeathed for Mrs. *Campbell* and her children. On the 20th of May, 1885, upon the application of Mr. and Mrs. *Curtis* and the other persons beneficially entitled to the £3000 and the one-sixth of the residue, an order was made in Chambers, directing (*inter alia*) payment to *Brown* and *Moor*, out of Mrs. *Curtis's* share in the funds in Court, of the sum of £1179 1*s.* 1*d.* due to them on their mortgage for principal and interest up to the 1st of July, 1885. Upon the hearing of this application *Brown* and *Moor* were represented by their solicitors, and they did not appeal against the order. The £79 1*s.* 1*d.* represented interest on the £1100 at 7 per cent. per annum from the 9th of May to the 9th of November, 1884, and at 6 per cent. from the 9th of November, 1884 to the 1st of July, 1885. The date of the 1st of July, 1885, was fixed, because it was supposed that the order would be completed before then, so that the payment could be made to the mortgagees on that day. Some delay took place in the completion of the order, and the payment was not made to the mortgagees on the 1st of July. On the 2nd of July the mortgagees took out the present summons, asking that, instead of their being paid £1179 1*s.* 1*d.* for principal and interest, as

PEARSON, J. provided by the order of the 20th of May, 1885, they might be paid £1100 principal money and interest thereon at the rate of 7 per cent. per annum from the 9th of May, 1884, to the 9th of May, 1885, and from that date at the rate of 6 per cent. per annum to the actual day of payment, and six months' interest at the same rate in lieu of notice. The order was completed on the 20th of July, and on the 21st of July the mortgagees took the £1179 1*s.* 1*d.* out of Court.

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Cookson, Q.C., for the summons:—

The mortgagees are entitled to interest at the rate asked by the summons. The mortgagors are not entitled to the reduction to 6 per cent. for the half-year ending the 9th of May, 1885, the payment of interest not having been made punctually.

Inasmuch as the payment out of the fund in Court could not, owing to the delay in the completion of the order, be made in time, in accordance with the notice to pay off the mortgage, the mortgagees are, according to the ordinary rule, entitled to a further six months' interest in lieu of notice: *Bishop* v. *Church* (1).

Bramwell Davis, for the mortgagors:—

The mortgagees have come in and consented to the jurisdiction of the Court; the Court is administering the mortgagors' share, and has seisin of the whole matter. By thus coming in and proving the amount due to them the mortgagees have consented to accept payment whenever the Court will give it to them: *Fisher* on Mortgages (2); *Matson* v. *Swift* (3).

[PEARSON, J.:—In that case the mortgage debt was due from the estate which the Court was administering; here the debt is not the debt of the testator, but of one of the beneficiaries under the will, and the Court has no jurisdiction over the mortgagees.]

Their submission to the jurisdiction makes the case analogous. And their proving their debt was equivalent to a demand for payment, and prevents their claiming six months' interest: *Day* v. *Day* (4). They are only entitled to additional interest down

(1) 2 Ves. Sen. 371, 372.
(2) 4th Ed. p. 734.
(3) 5 Jur. 645.
(4) 31 Beav. 270.

to the day of payment, even if, after taking the money out of Court, they can claim that.

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[PEARSON, J.:—This summons was taken out before they received the money out of Court.]

They cannot be entitled now to interest at the higher rate after the order of the 20th of May, from which they did not appeal.

[PEARSON, J.:—I think that is so.]

Cookson, in reply:—

Day v. *Day* (1) does not apply. There the mortgagee had consented to a sale of the mortgaged property in a suit to administer the mortgagor's estate. Here we only assented to being paid on the 1st of July. We did not apply for the order of the 20th of May; we could not help ourselves. The rule is clear that, if the mortgage money is not paid on the expiration of the notice, the mortgagee is entitled to a further six months' notice or to interest in lieu of notice: *Bartlett* v. *Franklin* (2).

PEARSON, J. (after stating the facts, continued):—

The order of the 20th of May was made in the presence of both parties. It was then assumed that the division of the estate would be completed by the 1st of July, and on that footing the interest was assessed at £79 1*s.* 1*d.*, and the sum of £1179 1*s.* 1*d.* was ordered to be paid to the mortgagees on the 1st of July, as being the amount of principal and interest which it was assumed would be due to them at that date. It turned out that the order could not be carried through by that day, and consequently the payment could not be made till the 21st of July, on which day the mortgagees took the £1179 1*s.* 1*d.* out of Court. Under these circumstances two points are now raised: (1) that the mortgagees are entitled to interest at the rate of 7 per cent. for the half-year ending the 9th of May, 1885; (2) that they are entitled to an additional six months' interest in lieu of a fresh notice to pay them off. On the first point I have already expressed my opinion that the mortgagees have agreed to accept

(1) 31 Beav. 270. (2) 15 W. R. 1077.

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interest at the rate of 6 per cent. for the six months ending the 9th of May, 1885, and the order was drawn up accordingly, and they cannot now be heard to insist on interest at the rate of 7 per cent. To that opinion I adhere.

As to the second point, the contention is that the mortgagees agreed to accept payment on the 1st of July, and that, as the money was not paid to them, they are entitled to a fresh six months' notice, or to six months' interest in lieu of notice. No doubt that is the ordinary rule when a mortgagor gives notice to pay off the mortgage, and he does not make the payment on the appointed day. And the principle of the rule is this, that, if the mortgagor fails to make the payment on the appointed day, there is no *constat* when the mortgagee will get his money, and he will be unable to make any arrangement for its investment. I do not think that the principle has any application to a case where a mortgagee has been a party to an order for the payment of his debt out of a fund in Court. In such a case he knows that he will be paid as soon as the order is completed, and, if I were to accede to the argument which has been addressed to me, it would follow in every case that if, through any mistake in the office, a delay of a single day should occur in the completion of the order, the mortgagee would be entitled to a fresh six months' notice or to six months' interest. I think that by accepting the order the mortgagees assented to the payment of the mortgage debt out of the fund in Court subject to all the contingencies to which the completion of the order might be subject, and that they are only entitled to additional interest at 6 per cent. up to the actual day of payment.

Solicitors: *Brown & Woolnough*; *W. B. Styer.*

W. L. C.

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PEARSON, J.

1885

Oct. 27; *Nov.* 4.

[1884 M. 1474.]

Inheritance—Descent ex parte maternâ or ex parte paternâ—Marriage Settlement—Construction—Ultimate Limitation to right Heirs of Wife's deceased Mother—Inheritance Act (3 & 4 *Will.* 4, *c.* 106), *s.* 4 [*Revised Ed. Statutes, vol. vii., p.* 621].

Sect. 4 of the *Inheritance Act* (3 & 4 Will. 4, c. 106) is not merely declaratory of the old law; it introduces a new rule as to the tracing of the descent in the case of a limitation to the heirs general of a deceased person.

By a marriage settlement executed in 1810, real estate of the wife was limited to the use of the husband for life, remainder to the use of the wife for life, and, after limitations in favour of the issue of the marriage, the ultimate limitation was "to the use of the right heirs of *J. W.*, deceased (the mother of the wife), for ever." At the date of the settlement the wife was seised of part of the real estate as the heiress-at-law of her deceased mother, and of the other part as one of the co-heiresses of her deceased maternal great uncle. The wife died in 1846; the husband died in 1871. The limitations in favour of the issue all failed on the death in 1880 of the surviving son of the marriage:—

Held, that, if under the ultimate limitation the wife took the estate as a purchaser, *Mandeville's Case* (1) did not apply, and that the descent from her would be traced in the ordinary way, and not *ex parte maternâ*.

But *held*, that, under the ultimate limitation, the wife took the estate as part of the old estate which she had before the marriage, and that the descent was not broken by the settlement.

BY the settlement, dated the 18th of August, 1810, and made on the marriage of *Benjamin Maddock* and *Jane* his wife, then *Jane Walker*, spinster, certain real estate of the wife was limited to the use of the husband for his life, with remainder to the use of the wife for her life, with remainder to the use of the children of the marriage, with an ultimate remainder "to the use of the right heirs of the said *Jane Walker*, deceased (mother of the said *Jane Walker* party hereto), for ever." At the date of the settlement *Jane Walker*, the daughter, was the heiress-at-law of *Jane Walker* the mother.

Part of the real estate comprised in the settlement had de-

(1) Co. Litt. 26 b.

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scended on the settlor as heiress-at-law of her mother, who died in 1798, and who at the time of her death was entitled thereto in fee as purchaser. The remainder of the real estate had descended on the settlor as one of the two co-heiresses-at-law of her maternal great uncle, *Thomas Cooper*, who at the time of his death was entitled thereto in fee as purchaser.

Jane Maddock died in 1846, and *Benjamin Maddock* died in December, 1871. The intermediate limitations of the settlement failed on the death in January, 1880, of the last surviving son of the marriage intestate and unmarried. The question in this action was, who was entitled under the ultimate limitation. The Plaintiff alleged that he was the heir-at-law of *Jane Walker*, the mother of the settlor, and also the heir-at-law of *Thomas Cooper*, and as such claimed to be entitled to the two properties respectively. The Defendants were the trustees of the settlement, and the heir-at-law of the son. The trustees were appointed by the Court to represent the heir *ex parte paternâ* of *Jane Maddock*.

Cozens-Hardy, Q.C., and *Northmore Lawrence*, for the Plaintiff:—

A limitation to the right heirs of a deceased person gives an estate in fee to the person who answers the description of heir at the time of the execution of the deed. The wife, therefore, took as purchaser an estate in fee in reversion, but the estate would devolve on her heirs *ex parte maternâ*, just as if she had taken by descent instead of by purchase. Her son took from her by descent, and on his death the descent must be traced from his mother, as if she had taken by descent: *Williams* on Real Property (1); *Fearne* on Contingent Remainders (2); *Mandeville's Case* (3); *Elphinstone* on the Interpretation of Deeds (4). If the deed had been executed since the *Inheritance Act*, 3 & 4 Will. 4, c. 106, there could have been no doubt, for sect. 4 of that Act provides that "when any person shall have acquired any land by purchase under a limitation to the heirs, or to the heirs of the body, of any of his ancestors" contained in a deed executed after the 31st of December, 1833, "such land shall descend, and the descent thereof shall be traced, as if the ancestor named in such

(1) 15th Ed. pp. 313–315.
(2) 10th Ed. pp. 80, 82.
(3) Co. Litt. 26 b.
(4) Page 228, r. 68.

limitation had been the purchaser of such land." That, however, is only declaratory of the old law.

If this view of the effect of the ultimate limitation is wrong, it may be said that the ultimate remainder to the wife was part of her old estate,—that it was a reversion remaining in her, subject to the prior limitations of the settlement, and, consequently, that the descent is not broken, but must still be traced *ex parte maternâ: Cholmondeley* v. *Clinton* (1).

The practical result will, it is believed, be the same to the Plaintiff, but, with regard to that part of the estate which descended on *Jane Maddock* from her uncle, the Plaintiff will have difficulty in tracing his heirship. Therefore, it would be better for him to have the former construction adopted.

R. F. Norton, for *Jane Maddock's* heir *ex parte paternâ* :—

If *Jane Maddock* took as a purchaser under the ultimate limitation of the settlement, still there is no authority for saying that the descent from her is to be traced *ex parte maternâ*. *Mandeville's Case* (2), and the other authorities cited, relate to a limitation to the heirs of the body of a deceased person. There it was held that there was a *quasi* estate tail; that, though the person who answered the description of heir of the body took as a purchaser, the descent was to be traced as if he had taken as heir of the body of the person named. That has no application to a limitation to the heirs general of a deceased person. There is no authority before the *Inheritance Act* for applying the rule to such a case.

On the other point—that the descent is not broken by the settlement—I admit that the authorities are against me: *Heywood* v. *Heywood* (3).

L. Ryland, for the heir of the deceased son.

Cozens-Hardy, in reply:—

It would be strange if the rule in *Mandeville's Case* could be altered by the addition of the words "of the body" to the word

(1) 2 J. & W. 1.
(2) Co. Litt. 26 b.
(3) 13 W. R. 514.

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"heirs." The principle of the rule applies to a limitation in fee equally with a limitation in fee tail. Sect. 4 of the *Inheritance Act* puts the law as to estates in fee and estates in fee tail on the same footing, and it is really declaratory of the old law.

But, if necessary, the Plaintiff relies on the other view—that the ultimate limitation is part of *Jane Maddock's* old estate, and that the descent is not broken.

Nov. 4. PEARSON, J.:—

The question in this case arises upon the construction of the marriage settlement of Mr. and Mrs. *Maddock*, which was executed in 1810. [His Lordship stated the facts and continued:—] It is admitted that on the death of the son in 1880 the ultimate limitation of the settlement took effect, and the question is, in what way it took effect? It seems to me that no one reading the settlement could have much doubt about the construction. The natural construction would be that, as Mrs. *Maddock* (the settlor) was the only child of her deceased mother, she took under the ultimate limitation such part of her former estate as was not disposed of by the former limitations of the settlement. That part of her old estate which was not disposed of remained in her, or was limited to her again, so as not to break the descent. She took it as part of her old estate. Her heir-at-law has discovered that, if she took the ultimate remainder in that way, he may have some difficulty in making out his title to that part of the property which came to her as one of the co-heiresses of her uncle. He believes that he shall be able to do so, but it may put him to some trouble and expense, and he is therefore desirous, if possible, of obtaining the property by a short cut. The ingenuity of counsel has come to his assistance, and it has been suggested that the proper construction of the ultimate limitation is, not to continue in Mrs. *Maddock* so much of her old estate as she did not part with under the prior limitations of the settlement, but that the rule which was acted upon in *Mandeville's Case* (1) comes into operation, and that, although Mrs. *Maddock* took by purchase, as being the right heir of her mother, the descent is to be traced from her *ex parte maternâ*, just as if she had taken by descent and not

(1) Co. Litt. 26 b.

by purchase. In *Mandeville's Case* (1), "*John De Mandeville* by his wife *Roberge* had issue *Robert* and *Maude*. *Michael de Morevill* gave certaine lands to *Roberge* and to the heires of *John Mandeville* her late husband on her body begotten, and it was adjudged that *Roberge* had an estate but for life, and the fee taile vested in *Robert* (heires of the body of his father being a good name of purchase), and that when he dyed without issue, *Mawde* the daughter was tenant in taile as heire of the body of her father, *per formam doni*. . . . And yet in truth the land did not descend unto her from *Robert*, but because she could have no other writ it was adjudged to be good. In which case it is to be observed, that, albeit *Robert* being heire took an estate taile by purchase, and the daughter was no heire of his body at the time of the gift, yet she recovered the land *per formam doni*, by the name of heire of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and therefore when the gift was made she tooke nothing but in expectancy, when she became heire *per formam doni*."

That case was very fully discussed by *Kindersley*, V.C., in *Wright* v. *Vernon* (2), and in the course of his judgment he said (3): "I do not purpose to discuss the merits of the original decision, though perhaps it might not be very difficult to shew that the exigency of the statute *De Donis*, which peremptorily directed that the will of the donor should always for the future be observed, left no alternative but to decide *Mandeville's Case* as it was decided; inasmuch as, when the estate was limited to the heirs special of a particular ancestor, without any estate of freehold limited to the ancestor himself (either expressly or by implication), it was impossible to effectuate that expressed will of the donor, and to make the estate pass through the whole series of the special heirs designated, except by regarding the limitation as if it were an estate tail which had originally vested in, and had descended from, the ancestor himself; and yet the first taker must take as purchaser, because no estate did in fact vest in or descend from the ancestor. Obedience to the positive injunction of the statute *De Donis* appears to have necessitated the

(1) Co. Litt. 26 b.
(2) 2 Drew. 439.
(3) 2 Drew. 455.

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creation of this anomalous kind of entail, which Lord *Hale* fitly terms a *quasi* entail, partaking of the opposite qualities of purchase and descent." Then he said that *Mandeville's Case* (1) had been recognised as law and followed for at least five centuries, and he declined to depart from it. But *Mandeville's Case* and the statute *De Donis* related to an estate limited to special heirs, and not to an ordinary estate in fee, and you cannot by any process of reasoning apply the rule there laid down to an ordinary case in which the limitation is, not to heirs special, but to heirs general. I hold, therefore, that under the ultimate limitation of the settlement, Mrs. *Maddock* took the estate as part of the old estate to which she was entitled previously to the marriage.

Solicitors: *C. J. Mander; George Cheesman*, agent for *Miles & Co., Leicester; Le Brasseur & Oakley*, agents for *Stone, King, & Co., Bath.*

W. L. C.

PEARSON,J. 1885 *Nov.* 2, 3, 4.

RAMSKILL *v.* EDWARDS.

[1881 R. 523.]

Sureties—Contribution—Directors—Breach of Trust—Discharge in Bankruptcy—Liability of Executor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 49.

The directors of a company advanced moneys of the company upon an unauthorized security, and two sums of £600 and £400 so lent were lost. The £600 formed part of a loan of £800, and the £400 formed part of a loan of £1000, which was granted by the board of directors, and of which £400 was actually advanced and repaid, and a second £400 was advanced and not repaid. In an action by the company against one of the directors who had taken part in granting the loans, he was held liable to pay the two sums of £600 and £400 to the company, and, having paid them, he sued three of his co-directors for contribution.

One of the Defendants was not present at the meeting at which the loan of £800 was granted, and at which a cheque for the £800 was drawn, but he was present at a subsequent meeting at which the minutes of the former meeting were read and confirmed. The £800 had been already paid to the borrower:—

Held, that, whether the Defendant would or would not have been liable

(1) Co. Litt. 26 b.

to the company, there was no equity to compel him to contribute to the Plaintiff in respect of the £600.

The same Defendant was present at the meeting at which the loan of £1000 was granted, when he protested strongly against it. He was present at a subsequent meeting at which the minutes of the first meeting were read and confirmed, and he then signed a cheque which was drawn for the first £400:—

Held, that by signing the cheque he had adopted the whole loan of £1000, and that he was therefore liable to contribute in respect of the second £400 which was lost.

Another Defendant filed a liquidation petition under the *Bankruptcy Act*, 1869, and had obtained a discharge from his creditors before the action was brought by the company against the Plaintiff:—

Held, that this Defendant's liability to contribute was a liability "incurred by means of a breach of trust" within the meaning of sect. 49 of the Act, and that the Defendant was not released from it by the discharge.

The third Defendant died after the commencement of the action, and his administrator was then made a Defendant:—

Held, that the liability to contribute survived against the Defendant's estate.

TRIAL OF ACTION.

The action was brought by Dr. *J. S. Ramskill*, who was formerly a director of the *Imperial Union Accident Assurance Company*, against *Richard Passmore Edwards*, and *J. H. Evens*, formerly co-directors with the Plaintiff, *Arthur Long*, the administrator of *George Long*, another co-director, who had died since the issue of the writ, and *J. Simpson*, *N. Gibbs*, and *J. Smith*, three other co-directors of the Plaintiff, who were insolvent and did not appear at the trial, claiming contribution from the Defendants in respect of a sum of £1300, which the Plaintiff had been compelled to pay under a judgment which the company had recovered against him on the 25th of November, 1880, in an action brought by the company against him.

The company was incorporated on the 15th of December, 1875. Clause 55 of the articles of association nominated six persons as the first directors of the company, of whom three were *Evens*, *George Long*, and *Ramskill*.

By clause 65 "Every director, auditor, managing director, and other officer shall be indemnified by the company from all losses and expenses incurred in and about the discharge of his respective duties, except such as happen from his own wilful acts, neglects and defaults."

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By clause 67 "No director or officer shall be liable for any other director or officer, or for joining in any receipt or other act for conformity, or for any loss or expenses happening to the company by the insufficiency or deficiency of title to any property acquired by order of the board for or on behalf of the company, or for the insufficiency or deficiency of any security in or upon which any of the moneys of the company shall be invested, or for any loss or damage arising from the bankruptcy or tortious act of any person with whom any moneys, securities, or effects shall be deposited, or for any other loss, damage, or misfortune whatsoever which shall happen in the exercise of the duties of his respective office, or in relation thereto, unless the same happen through his own wilful act or default."

Clause 68 empowered the directors (*inter alia*) to "invest the funds of the company upon such securities as they deem fit, with power to purchase freehold, copyhold, or long leasehold property, and to accept less than a marketable title."

Clause 83. "It shall be the duty of the managing director to act under the orders and directions which shall from time to time be given or transmitted to him by the board."

By clause 85 "The said *J. H. Evens* shall be the first managing director of the company, and shall be entitled to hold office for the term of seven years from the registration of the company."

Clause 86. "The said *J. H. Evens* shall receive from the company for his services as managing director the sum of £500 per annum, and a commission of 2½ per cent. upon the premium income in excess of the sum of £10,000 per annum."

Evens never received any fee as director in addition to his salary as managing director. He held the office of managing director during the whole of the transactions in question in this action, and he and the Defendants *Edwards* and *George Long* were directors during the same period.

At a meeting of the board of directors held on the 28th of November, 1876, it was resolved that a loan of £800 should be made, at 10 per cent. per annum interest, on the security of a six months' bill of exchange accepted by *Don Pedro Galvez,* the then Peruvian Minister in *England,* and Colonel *Jara Almonte,* the then Chief Secretary of the Peruvian Legation in *England.* At

this meeting the Plaintiff and *Evens* were present, but neither *Edwards* nor *George Long* was present. In pursuance of the resolution a cheque for £800 was on the same day drawn on the company's bankers, and signed by the Plaintiff and the Defendant *Simpson*, and the proceeds of the cheque were received by *Galvez* and *Almonte*, or one of them, in exchange for the bill of exchange. The minutes of this meeting were read and confirmed at a subsequent meeting of the board on the 4th of December, 1876. The Plaintiff and *Edwards* and *Evens* were present at this meeting, but *George Long* was not. The bill was renewed from time to time, and £200, part of the £800, was repaid with interest on the 3rd of July, 1878. On that day the balance of £600 was permitted by the then directors of the company to remain outstanding for a further period of three months, on the security of a bill of exchange of that date drawn by *Almonte* upon and accepted by *Galvez*. This bill was dishonoured at maturity. No part of the £600 was ever repaid to the company. This £600 formed part of the £1300 which the Plaintiff had been ordered to pay under the judgment of the 25th of November, 1880.

At a meeting of the board on the 3rd of January, 1877, it was resolved "that a loan of £1000, at 7 per cent. for three years, be granted on the joint security of the Peruvian Minister and Colonel *Jara Almonte*, Chief Secretary of Legation, repayable in three equal instalments from the date of loan, the advances to be made as the funds admit thereof."

At this meeting the Plaintiff, *Edwards*, *Evens*, and *George Long* were present. *Edwards* said that he objected to the proposed loan, and strongly protested against it being made. The majority of the directors present approved of it, though no actual voting took place. *Edwards* took no steps to prevent the carrying out of the loan. The minutes of this meeting were confirmed at a meeting of the board on the 15th of January, 1877. At that meeting a cheque for £400, part of the £1000, was drawn upon the company's bankers, and the proceeds of this cheque were afterwards received by the borrowers. *Edwards* was one of the directors who signed the cheque. This £400 was afterwards repaid to the company, viz., £200 in March, 1878, and the remainder in January, 1879. At a meeting of the board on the 5th of

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September, 1877, at which the Plaintiff, *Edwards*, *Evens*, and *George Long* were present, a cheque for a second £400 (further part of the £1000) was drawn on the company's bankers. The proceeds of this cheque were received by the borrowers. *Edwards* did not sign that cheque, but *George Long* did. This £400 was never repaid. All the loans were made at the instance of *Evens*, who introduced the transactions to the board. No inquiry was made by the board as to the solvency of the borrowers, but they accepted the assurance of *Evens* that they were solvent, and that the advances would certainly be repaid. *Galvez* died in October, 1878.

In the action by the company against *Ramskill*, *Jessel*, M.R., held that the making of the advances was *ultrà vires*, and that *Ramskill* must repay to the company the two sums of £600 and £400, with interest and costs. Under this judgment the Plaintiff had paid £1300 to the company.

Evens said he never voted for any of the loans, but acted simply as manager and not as director.

Evens filed a liquidation petition on the 18th of June, 1879, and on the 5th of July, 1879 (before the action was brought by the company against the Plaintiff), his creditors resolved to give him a discharge. He inserted the company in his statement of affairs as creditors, but they did not prove in the liquidation.

Higgins, Q.C., and *C. H. Turner*, for the Plaintiff:—

The Plaintiff is entitled to contribution from all the three Defendants who appear. The right to contribution exists between tort-feasors when the tort is one of this description; it is not like a crime. The wrong is in the nature of a breach of trust: *Ashhurst* v. *Mason* (1). A trustee, who has had to pay money to make good a breach of trust, is entitled to bring an action for contribution against his co-trustees, who have been parties to the breach of trust: *Lewin* on Trusts (2). The concurrence of a director in a breach of trust is sufficient to render him liable to the company: *Land Credit Company of Ireland* v. *Lord Fermoy* (3); *Joint Stock Discount Company* v. *Brown* (4). The presence of *Edwards*

(1) Law Rep. 20 Eq. 225.
(2) 7th Ed. p. 776.
(3) Law Rep. 8 Eq. 7; 5 Ch. 763.
(4) Ibid. 8 Eq. 381.

at the meeting at which the minutes of the meeting which authorized the first loan of £800 were confirmed was sufficient to make him liable to the company for the £600 of that loan which remains unpaid, and, if so, he is liable to contribute to the Plaintiff.

As to the £400 which remains unpaid of the second loan, the protest which *Edwards* made at the meeting at which the loan was authorized is not enough to excuse him. He took no active steps afterwards to prevent the carrying out of that loan, and his signing the cheque for the first £400 amounted to an adoption by him of the original resolution, and makes him liable for the second advance of £400, which has not been repaid.

As to the Defendant *Evens*, he was a party from the first to all the loans. He was a director of the company, as well as the managing director, and he cannot get rid of his liability in the former character because he filled also another character. The discharge which he obtained in his liquidation does not release him from this liability, because it arises by reason of a breach of trust, even if the liability was provable in the liquidation, which was before the action was brought by the company against the Plaintiff: *Bankruptcy Act*, 1869, sects. 31, 49; *Ex parte Hemming* (1).

As to *George Long*, he had nothing to do with the first loan, but he authorized the second, and his estate is liable in respect of it. The liability is not a mere personal one, which came to an end upon his death. The liability survives against his estate.

Bompas, Q.C., and *Swinfen Eady*, for the Defendant *Edwards*:—

Edwards is not liable at all. The first loan was actually paid before the meeting of the board at which the resolution authorizing the advance was confirmed. To make him liable it must be shewn that an injury accrued to the company by the continuance of the loan,—that the money could have been recovered. At any rate he is protected by clause 67 of the articles of association. As to the second loan, *Edwards* protested against it, but he was outvoted. No doubt in *Joint Stock Discount Company* v. *Brown* (2) a dissentient director was held liable. But the

(1) 13 Ch. D. 163. (2) Law Rep. 8 Eq. 381.

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articles of association of that company did not contain the provisions which are contained in the articles of the present company. The company could not have recovered against *Edwards*. But, if they could, the right to call for contribution depends on the existence of an equity as between persons who stand in exactly the same position. A director who has assented to and been party to a breach of trust cannot obtain contribution from his co-director who did not assent to it. The signing the cheque for the first £400 of the second loan was a mere ministerial act. That £400 has been repaid, and the signature of that cheque cannot make *Edwards* liable in respect of the second £400.

There is no evidence of want of *bona fides* on the part of the directors; there was no such gross negligence on their part as to render them personally liable for the loss. At any rate the Plaintiff was an assenting party throughout, and *Edwards* stands in such a different position that the Plaintiff is not entitled to contribution from him. In *Ashhurst* v. *Mason* (1) the transaction was not completed before the director who was not originally a party attended the meeting at which the resolution was confirmed. In *In re Forest of Dean Coal Mining Company* (2) it was held that a person who before the formation of a company was cognizant of, though not a party to, an improper payment of promotion money, and who afterwards became a director of the company, was not liable for a misfeasance because he took no steps to recover the money for the company. The liability of an active promoter of a breach of trust is not in the same category with that of a person who has done nothing but abstain from taking any steps to undo what the former has done, and therefore the former is not entitled to call on the latter for contribution.

E. Beaumont, for the Defendant *Evens*:—

Evens is not liable at all, (1) because he was the managing director of the company, and thus a mere servant of the board of directors; (2) because his discharge in the liquidation released him from the liability, if any.

(1.) He could not vote at a meeting of the board, and he never

(1) Law Rep. 20 Eq. 225. (2) 10 Ch. D. 450.

did so. He could not alter or control the decision of the other directors.

(2.) The liability (if it existed) was not "incurred by means of any fraud or breach of trust" within the meaning of sect. 49 of the *Bankruptcy Act*, 1869, and therefore it is not excepted by that section from the release which the discharge gives to a bankrupt from all other debts provable under the bankruptcy. There was nothing more than an honest blunder in managing the affairs of the company. To fall within the exception, the liability must result directly from a fraud or breach of trust. The misfeasance of a director is not strictly a breach of trust; it is only a *quasi* breach of trust. The liability of *Evens* was provable in the liquidation under sect. 31 of the *Bankruptcy Act*, 1869: *Collyer v. Isaacs* (1).

Mulligan, for the Defendant *Arthur Long*:—

George Long had nothing to do with the first loan of £800, and his estate cannot be made liable in respect of the £600 which remains unpaid. He could not have successfully taken any proceedings to recover it, and directors of a company are not in the same position as trustees of a trust fund; they have a discretion as to suing a debtor to the company.

And, as to the £400, even if *George Long* could, if he had been alive, have been compelled to contribute, the right of contribution does not rest on contract, but on equitable principles, and it does not survive against a personal representative. The action is in the nature of an action for a personal tort: *Phillips* v. *Homfray* (2); *Peek* v. *Gurney* (3); *Kirk* v. *Todd* (4). There is no evidence that *George Long's* estate has received any benefit from the act complained of.

Higgins, in reply:—

The making of the loans was a breach of trust, and the company could have successfully sued the Defendants, as they did the Plaintiff. Directors of a company, it is true, are not for all purposes in the same position as trustees, but, if they part with the

(1) 19 Ch. D. 342.
(2) 24 Ch. D. 439.
(3) Law Rep. 6 H. L. 377.
(4) 21 Ch. D. 484.

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funds of the company which have been intrusted to them for any purpose *ultrà vires*, they become liable to the company as if they were trustees: *Flitcroft's Case* (1). *In re Forest of Dean Coal Mining Company* (2) is distinguishable. These loans were constantly discussed by the board, and all the directors approved of them.

As to *Edwards*, if he had done his duty by at once taking some proceeding in respect of the first loan, he might have prevented the making of any further advance. He did nothing at all, and in this way he became liable to the company, and the right of contribution arises out of the payment by one man of a debt for which another is also liable. Contribution is the *primâ facie* right of the man who pays, though it may be excluded on special grounds. If a man ratifies and confirms an act, he makes it his own act for all purposes; he becomes a principal actor. And as to the £1000 loan, *Edwards*, notwithstanding his protest, adopted it altogether by signing the cheque for the first £400 which was advanced on account of it.

As to *Evens*, his position as managing director did not relieve him of his duty as a member of the board. And, as to the effect of the liquidation, either the liability was not capable of being proved under sect. 31, or, if it was, it was incurred by means of a breach of trust, and then sect. 49 provides that the discharge shall not release the debtor from it: *Ex parte Hemming* (3); *Emma Silver Mining Company* v. *Grant* (4); *Cooper* v. *Prichard* (5). Even if the company had proved in the liquidation, they might sue the debtor personally for the unpaid balance: *Robson* on Bankruptcy (6). If the company would be barred by the discharge, the Plaintiff *Ramskill* is not, for the right of contribution did not arise till after the liquidation petition: *Robinson* v. *Ommanney* (7); *Wallis* v. *Swinburne* (8). *Collyer* v. *Isaacs* (9) only decides that an assignment of future chattels amounts to no more than a covenant to assign; if there was a breach of such a covenant, the covenantee could sue the covenantor.

(1) 21 Ch. D. 519.
(2) 10 Ch. D. 450.
(3) 13 Ch. D. 163.
(4) 17 Ch. D. 122.
(5) 11 Q. B. D. 351.
(6) 5th Ed. p. 714.
(7) 21 Ch. D. 780; 23 Ch. D. 285.
(8) 1 Ex. 203.
(9) 19 Ch. D. 342.

As to *Long*, an executor of a deceased surety may be sued for contribution: *Leake* on Contracts (1). Neither *Phillips* v. *Homfray* (2) nor *Peek* v. *Gurney* (3) apply. This case falls within the exception stated by Lord Justice *Bowen* (4); but for that exception, the executor of a deceased trustee could not be sued for a breach of trust unless his testator's estate had been benefited by it.

PEARSON, J. (after stating the facts relating to the first loan of £800, continued):—

The Plaintiff says that the Defendant *Edwards* was equally liable with himself to the company for the £600 which remains unpaid of that loan, and in support of that contention *Ashhurst* v. *Mason* (5) was cited, in which case directors who were not actually present when certain acts *ultrà vires* were authorized were held liable to the company. To my mind it may very well be that *Edwards* is liable to the company. But the question is, whether that makes him liable as between himself and the Plaintiff, who was present when the loan was made, and the company's money paid away at a meeting at which *Edwards* was not present. The question is, whether his presence at the subsequent meeting makes him in equity liable. Now the principle of the doctrine of contribution between sureties was thus stated by Lord *Redesdale* (6): "The principle established in the case of *Dering* v. *Earl of Winchelsea* (7) is universal, that the right and duty of contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always in

(1) Page 81.
(2) 24 Ch. D. 439.
(3) Law Rep. 6 H. L. 377.
(4) 24 Ch. D. 454.
(5) Law Rep. 20 Eq. 225.
(6) 1 W. & T. L. C. 5th Ed. p. 112.
(7) 1 Cox, 318.

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conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of the decision in *Dering* v. *Earl of Winchelsea* (1); and in that case there was no evidence of contract."

This, therefore, is a question of equity and of equity only. There certainly was no contract here of any sort or description; and I have to determine on the ordinary principles of equity whether under the circumstances there is any equity to make the other directors contribute to what the Plaintiff has been ordered to pay. That the Plaintiff was liable there can be no doubt. But *Edwards* was not present when the loan was authorized. He was present at the meeting at which the resolution authorizing the loan was confirmed, after the money had been actually paid away. To my mind, therefore, he was not a party to the making of the loan, and, as between himself and the Plaintiff, I can see no equity whatever to order him to repay to the Plaintiff any part of the loan for the making of which *Edwards* was not responsible, and in the making of which he took no part.

The case in respect of the £600 is unlike that as to the £400, because, however much *Edwards* protested in that matter, whatever his dislike to the making of the £1000 loan, I think it is plain that he afterwards assented to it in more ways than one. But, in respect of the £600, although he may have been responsible to the company, either from the fact of his being present at the subsequent meeting when the resolution was confirmed, or from his not taking any steps to get in the loan, the Plaintiff cannot, I think, be heard to say that *Edwards* is liable to him.

[His Lordship then stated the facts relating to the second loan, and continued:—]

To my mind the signing by *Edwards* of the cheque for £400 at the meeting of the 15th of January, 1877, was an assent by him to the resolution which had been previously passed, by, at all events, a majority of the directors. I do not forget that, according to the minutes, there never was really any voting, but I mean that, after the board had discussed the matter, the resolution was assented to by the majority. It was entered in the books, and *Edwards* afterwards signed the cheque, which could only have

(1) 1 Cox, 318.

been signed if the board had agreed to it. When *Edwards* was pressed as to his signing the cheque, his answer was that he signed ministerially; that it would have been of no use for him to refuse to sign, for some one else would have signed the cheque. To my mind a director who thought that the loan was improper was not justified in signing the cheque, and thus giving effect to the resolution, and the result of his signing is that he must be held to have adopted the resolution, and to have agreed to give effect to it. It is true that the £400 for which that cheque was drawn was not the £400 which the Plaintiff was ordered to pay; the first £400 was paid off, and the £400 which the Plaintiff has had to pay is a further part of the £1000 which was authorized to be lent, and the question is whether *Edwards* is liable to contribute in respect of that second £400? In my judgment he is, and for this reason, that his signature of the cheque for the first £400 must be taken to be an accession by him to the resolution for the loan of £1000, and after that accession there is not to be found any protest by him against the further advance.

The case of the deceased Defendant *George Long* is to a certain extent parallel to that of *Edwards*. *Long* was not present at either of the meetings relating to the loan of £800; his case is, therefore, stronger than that of *Edwards*, and I cannot make his estate responsible for the £600. As regards the £400, *Long* was present at the meeting of the 5th of September, 1877, and he himself signed the cheque for the second £400, and therefore he would have been liable in respect of that. But Mr. *Mulligan* has contended that, inasmuch as he is dead, his estate cannot now be made liable. It was undoubtedly a bold contention, and if it succeeded, the result would be that any defaulting trustee would have only to die, and his estate would cease to be liable for his misfeasance. Not only is there no authority for such a proposition, but it seems to me that it would be most pernicious to allow it.

The third case is that of the Defendant *Evens*. He stood in a peculiar position, for, by one clause of the articles of association, he was appointed one of the directors generally: by another clause he was declared to be managing director, and as managing

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director it was his duty to obey the instructions of the board of directors. The argument founded on that is, that *Evens* is not liable at all, because, being managing director, he had simply to obey whatever the board told him, however wrong their instructions might be. It appears that as managing director he introduced all these loans, and induced the directors to make them, and now it is said that, inasmuch as he was managing director, he is liable neither to the company nor to his co-directors. To my mind it is impossible for him to shake off his character and office of director in this way. He was just as much a director as he was the managing director, and I must treat him as standing in the same position as all the other directors. Clause 67 of the articles, which has been relied upon, is certainly not a provision for indemnifying the directors as between themselves, and as against the company it must have been already disposed of in the action against the Plaintiff, for, if it would have protected anyone, it would have protected him.

Then it is said, and this is undoubtedly the more difficult part of the case, that, by the discharge which *Evens* obtained in his liquidation he is freed altogether from any claim, either by the company or by his co-directors, in respect of these loans. I think he is not. To my mind the granting of the loans was a breach of trust within the meaning of sect. 49 of the *Bankruptcy Act*, 1869, which expressly excepts from the discharge debts "incurred by means of any fraud or breach of trust." Mr. *Beaumont* said that in this case there was not a breach of trust strictly speaking, but only a *quasi* breach of trust. So far as I am aware, there is no such thing known to the law as a *quasi* breach of trust. The expression used in sect. 49 is simply "breach of trust;" a *quasi* breach of trust, if it is a breach of trust at all, is within these words, which have the widest meaning possible, and I think I should be doing wrong to the Act if I did not give that meaning to them. I hold, therefore, that the discharge of the Defendant *Evens* is no bar to this action, and that he must contribute in respect of both the £600 and the £400.

Solicitors: *A. S. Ramskill; E. C. Rawlings; F. Carter; Sheppard & Riley.*

W. L. C.

In re OVEY.
BROADBENT *v.* BARROW.

[1881 O. 282.]

PEARSON, J.

1885

Oct. 31;
Nov. 2.

Administration of Estate—Charge of Legacies on Real Estate—Order of Application of Real and Personal Estate—Charitable Gift—Interest in Land—Power of Selection given to Trustees—Selection of Charities authorized to hold Land.

A testator, after directing his executors (whom he also appointed trustees) to pay his debts and funeral and testamentary expenses, and giving various pecuniary legacies, gave all his personal estate and effects, except money or securities for money, to *R.* And he gave and devised all the rest, residue, and remainder of his estate, both real and personal, to his trustees, upon trust thereout, in the first place, to pay two specified sums, and, as to the residue thereof, or such part or parts thereof as might lawfully be appropriated for the purpose, for such one or more or any hospital of a charitable nature, and in such proportions as they in their uncontrolled discretion should think fit.

It was held by the Court of Appeal that the gift to *R.* was not specific, but that all the pecuniary legacies were payable in full before she could be entitled to anything under the bequest to her. The personal estate (including that bequeathed to *R.*), was insufficient for the payment of the legacies, and the real estate had to be sold to make good the deficiency. After the legacies had been paid there remained a surplus of the proceeds of the sale of the real estate:—

Held, that the real estate was charged with the payment of the legacies only in aid of the personal estate, and that *R.* was not entitled to be recouped *pro tanto* out of the surplus the loss which she had suffered by the application of the personal estate bequeathed to her in the payment of legacies:

Held, also, that the trustees were entitled to appropriate the surplus to hospitals which were duly authorized to take land by devise.

HENRY OVEY, by his will, dated the 1st of June, 1881, directed his executors (whom he also appointed trustees) to pay his debts and funeral and testamentary expenses, and after making various pecuniary bequests, some of which were to charities, he gave all his personal estate and effects of which he should die possessed, and which should not consist of money or securities for money, to Mrs. *Robertson* absolutely. And he gave and

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devised all the rest, residue, and remainder of his estate, both real and personal, to his trustees, upon trust thereout, in the first place, to pay two specified sums of £500 and £100, and as to the residue thereof, or such part or parts thereof as might be lawfully appropriated to the purpose, for such one or more or any hospital of a charitable nature, and in such proportions as they, in their uncontrolled discretion, should think fit. And he directed that the aforesaid pecuniary legacies for charitable purposes should be paid exclusively out of such part of his personal estate as might lawfully be appropriated to such purposes, and preferably to any other payment thereout. And he empowered his trustees in their discretion to sell and convert into money all or any part of his real estate. The testator died on the 19th of June, 1881. The action was brought for the administration of his estate. Mr. Justice *Fry* held (1) that the gift to Mrs. *Robertson* was specific. The Court of Appeal (2) reversed this decision, and declared that the gift was not specific, and that all the pecuniary legacies were payable in full before Mrs. *Robertson* could be entitled to anything under it. But this declaration was to be without prejudice to any question, as between her and the testator's heir-at-law, as to the liability of the real estate to the payment of the pecuniary legacies in priority to the property bequeathed to her. This decision was affirmed by the House of Lords (3). It turned out that the whole of the personal estate (including that which was given to Mrs. *Robertson*) was insufficient for the payment of the testator's debts and pecuniary legacies, and it became necessary to resort to the real estate, which was sold for the purpose. After paying the legacies in full, there was a surplus of the proceeds of sale. This surplus was claimed (1) by Mrs. *Robertson* to make good *pro tanto* the bequest to her, on the ground that the real estate was liable to the payment of the pecuniary legacies in priority to the property bequeathed to her; (2) by the testator's heir-at-law; (3) by two hospitals selected by the trustees to take the surplus in equal shares.

The two hospitals selected were *St. George's Hospital* and the

(1) 20 Ch. D. 676. (2) 20 Ch. D. 680.
(3) 8 App. Cas. 812.

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Westminster Hospital. *St. George's Hospital* was incorporated by the Act 4 & 5 Wm. 4, c. xxxviii., by the name and style of the President, Vice-Presidents, Treasurers, and Governors of *St. George's Hospital.* The Act provided by sect. 1 that the corporation by that name should have perpetual succession and a common seal, and by the same name should be capable, without incurring the penalties or forfeitures of the *Statutes of Mortmain*, to hold for the purposes of the institution the hospital and piece of ground at or near *Hyde Park Corner*, and the house in *Old Bond Street* in the Act respectively mentioned, and by will, gift, purchase, or otherwise, to obtain, acquire, hold and retain for the purpose of the institution any lands, tenements and hereditaments, of whatsoever kind, either in fee or for terms of life or years, or otherwise, so as such lands, tenements and hereditaments, exclusive of the hospital and ground at *Hyde Park Corner* and the house in *Old Bond Street*, and also exclusive of any lands, tenements and hereditaments that might at any time after the passing of the Act be vested in them, or in any trustee or trustees for them, by way of mortgage, or upon which any money belonging to the institution might be charged, did not in the whole exceed the clear yearly value of £20,000 over and above all charges, computing the same at the rack-rent which might have been gotten for the same respectively at the time of the acquisition thereof, and also by will, gift, purchase, or otherwise, to obtain, acquire, hold, and retain for the purpose of the institution any moneys and other personal estate of what nature soever, including money secured on mortgage of, or charged upon, any lands, tenements, or hereditaments, and also to grant, aliene, demise, assign, and dispose of such hereditaments, moneys, and other personal estate. The total income derived from house, lands and hereditaments belonging to the hospital amounted in 1884 to £1256 10*s.* 3*d.*, and there was evidence that it had not since materially (if at all) increased. No income was derived from money secured by way of mortgage on houses, lands, and hereditaments.

The *Westminster Hospital* was incorporated by an Act 6 & 7 Wm. 4, c. xx., s. 1 of which contained similar provisions.

The action had been heard on further consideration (1).

(1) *Vide* 29 Ch. D. 560.

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This was a petition by the trustees of the will for payment of the surplus to the two hospitals respectively.

Cookson, Q.C., and *Borthwick*, for the trustees.

Giffard, Q.C., and *Decimus Sturges*, for Mrs. *Robertson*:—

The present question is left entirely open by the former orders of the Court; it is, in fact, expressly reserved. The pecuniary legacies are clearly charged on the real estate, and it is not merely a charge in aid of the personal estate; the realty is charged equally with the personalty. The two are in effect constituted a mixed fund. And, though the excepted residue which is given to Mrs. *Robertson* is subject to the payment of debts and legacies, it is not liable until after the general residue. Consequently, she is now entitled to have her legacy made good *pro tanto* out of the surplus proceeds of the real estate, which formed part of the general residue: *Allan* v. *Gott* (1). The present case is governed in principle by *Greville* v. *Browne* (2); the gift of the "rest, residue, and remainder" of the estate means that which is left after satisfying the prior gifts. The present point was reserved by the Court of Appeal because the heir-at-law was not then before the Court; if the Court had thought the decision ought to be in his favour, they could have so decided it in his absence. They must have been inclined in favour of Mrs. *Robertson*.

Cecil Russell, for the *Attorney-General*, as representing the charities:—

The real estate is charged with the payment of the legacies, but only in aid of the personal estate. In order that the debts and legacies should be payable rateably out of real and personal estate it is not enough that the testator should have created a mixed fund of realty and personalty; there must be words which, either directly or by necessary implication, direct that the payment is to be made rateably. In *Allan* v. *Gott* there were such words. The present case is governed by *Elliott* v. *Dearsley* (3).

(1) Law Rep. 7 Ch. 439. (2) 7 H. L. C. 689.
(3) 16 Ch. D. 322.

Fischer, Q.C., and *Stirling*, for the heir-at-law, were not heard.

Giffard, Q.C., for Mrs. *Robertson*, in reply.

PEARSON, J. (after stating the provisions of the will, and the other facts), continued :—

The contention now is that, by virtue of the gift of the residue of the testator's real and personal estate, the real estate must contribute, so far as it can, to make good to Mrs. *Robertson* what she has lost by reason of the general personal estate having been applied in the payment of the legacies in priority to her. To my mind, the only foundation for that argument is to be found in the reservation which was made by the order of the Court of Appeal, and which was necessarily continued in that order when it was affirmed by the House of Lords. The heir-at-law was no party to the action at that time, and neither the Court of Appeal nor the House of Lords would or could have decided any question against him in his absence. And it is not immaterial to observe that, in the judgment of *Jessel*, M.R., in the Court of Appeal, not one word is said with regard to this reservation, and, although I was counsel in the case myself, I do not recollect how the point was raised in the Court of Appeal. It must have been raised before *Lindley*, L.J., gave his judgment, and, inasmuch as the question whether it had any substance could not be decided against the heir-at-law in his absence, *Lindley*, L.J., very properly abstained from giving any opinion upon it, and I suppose it was at the request of Mrs. *Robertson's* counsel that the reservation was inserted in the order *valeat quantum*.

Is there, then, anything in the case to take it out of the ordinary rule of law for the administration of estates? It seems to me that both *Jessel*, M.R., and *Lindley*, L.J., in their judgment expressed in as plain terms as they could that ordinary rule. They said that, inasmuch as the gift to Mrs. *Robertson* could not be treated as a specific legacy, but was a gift of the general personal estate, with the exception of moneys and securities for money, the moneys and securities for money, which constituted the residue of the personal estate, must be applied first in payment of the legacies, and then the general personal estate, which was given to

PEARSON, J. 1885 *In re* OVEY. BROADBENT *v.* BARROW.

Mrs. *Robertson*, but which was in no way exonerated from the payment of the legacies, must be applied. There is, no doubt, a charge of the legacies upon the real estate, but there is nothing more than a charge; the personal estate is not exonerated. It is admitted that there is no authority for saying that, where there is simply a charge of legacies upon real estate, that charge is anything more than ancillary to the personal estate, or that it can be enforced against the real estate when the personal estate is sufficient to pay all the legacies. The cases in which the produce of the real estate has been blended with the personal estate, and constituted one fund out of which the legacies are to be paid, are totally different from the present case. To my mind there is nothing whatever in this case to shew that the ordinary rule of administration, which makes personal estate the primary fund for the payment of legacies, is not to be followed, and I must decide that it is to be followed.

Fischer, Q.C., and *Stirling*, for the heir-at-law:—

The charities are not entitled to any part of the proceeds of the sale of the real estate. The trustees are directed to give to the hospitals which they select only such parts of the residue "as may be lawfully appropriated to the purpose." That must be only pure personalty. There is nothing to shew that the testator had in his contemplation charities which were authorized to take land by devise. The gift is not of real estate as such.

Cecil Russell, for the *Attorney-General*, was not heard.

PEARSON, J.:—

I must say, as I have heard *Jessel*, M.R., say in other cases, that, though I do not know what the testator intended, I do know what he has said. Having given the residue of his real and personal estate to trustees, assuming, as I must conclude he did, that there would be some residue to dispose of, he directs his trustees to apply "such part or parts thereof as may be lawfully appropriated to the purpose, for such one or more or any hospital of a charitable nature, and in such proportions as they in their uncontrolled discretion shall think fit." Mr. *Fischer* says that

I cannot assume that he knew that there are some hospitals which are capable of acquiring real estate by devise. I do not see why I should assume that he did not know that there are such hospitals, but he may not have known whether those hospitals had already acquired all the real estate which they are authorized to take. But he says in effect, that his trustees are to appropriate (not to pay) such part or parts of the residue as may lawfully be appropriated to that purpose to any hospital of a charitable nature in such proportions as they think fit. It appears that there are some hospitals of a charitable nature which can thus take real estate, and I cannot see any reason why the trustees are not entitled to do exactly what the testator has directed them to do, viz. to appropriate the residue which they have in their hands to hospitals to which by law it can be lawfully appropriated. It seems to me that the testator has made an admirable distinction between this gift of residue and the money legacies which he has given to charities in the former part of the will. He says that those legacies are to be paid exclusively out of such part of his personal estate as may be lawfully appropriated to such purposes, and preferably to any other payment thereout. In the gift of the residue he in effect directs an appropriation of such parts of it as may be lawfully appropriated. I do not see any reason why the two hospitals should not take.

Solicitors: *Lawford, Waterhouse, & Lawford; Young, Jones, Roberts, & Hale; Hare & Co.; S. Copping.*

W. L. C.

C. A. 1885 Nov. 6.

In re SOUTHPORT AND WEST LANCASHIRE BANKING COMPANY.

FISHER'S CASE.
SHERRINGTON'S CASE.

Winding-up—Contributory—Conditional Application for Shares—Condition Subsequent—Allotment—Non-compliance by Company with Condition—Neglect to rescind by Allottee—Sale and Transfer by Allottee.

A new company was constituted to take over the assets and liabilities of an old company in liquidation, under a scheme by which each shareholder in the old company was entitled to a share in the new company in respect of every share held by him in the old company, but no sum was to be deemed paid up on any share, £1 per share was to be paid up within a month, and no share was to be transferred until all calls thereon had been paid.

R. F., a shareholder in the old company, had declined to come in under the scheme, but was willing to pay £700 on being relieved within two years of all liability in respect of the old company. Before any payment had been made by *R. F.*, one *Fisher*, a shareholder in the old company, applied for 700 shares in the new company "on condition that I am credited with £1 per share paid into a fund by *R. F.*"

By a resolution of the directors of the new company passed in the presence of *Fisher*, certain ordinary shares were allotted to him, and 700 ordinary shares were also allotted to him "conditional," that word being placed opposite to them in a list of allotments appended to the resolution.

Letters of allotment and certificates in respect of the first-mentioned ordinary shares were sent to *Fisher*, but none were sent to him in respect of the 700 shares, and his name was, but without his knowledge, entered on the register of shareholders in respect of the 700 shares as well as the others, but with the word "conditional" written opposite the 700 shares.

Fisher afterwards sold and transferred 400 of the 700 shares to *Sherrington*, and the company registered the transfer and issued certificates to *Sherrington* for 400 shares, crediting him with £1 as paid up thereon and placing him on the register as the holder of 400 shares. *R. F.* was not relieved from his liability within the two years, and did not pay the £700; and the new company went into liquidation without any steps having been taken by *Fisher* to enforce the condition of his application or to rescind it:—

Held, in *Fisher's Case*, that the condition attached to his application was a condition subsequent, which, owing to the liquidation of the company, could not now be enforced; that under the circumstances *Fisher* must be deemed to be a member of the company within the meaning of sect. 23 of the *Companies Act*, 1862, and must be placed upon the list of contributories in respect of 300 shares:

And, *held*, in *Sherrington's Case*, that he must be placed upon the list of contributories in respect of 400 shares.

APPEAL from County Palatine Court of *Lancaster*.

On the 1st of July, 1881, a new company bearing the above-

mentioned title was constituted to take over the business, assets, and liabilities of an old company of the same name then being wound up, under a reconstruction scheme or agreement, which provided (*inter alia*) that each shareholder in the old company should be entitled to require the new company to allot to him one share therein (on which nothing was to be deemed to be paid up) in respect of each of his shares in the old company.

The capital of the new company was divided into shares of £5 each, and by the articles of association (art. 15) the sum of £1 per share was payable in two instalments of 10*s.* each, on the 8th and 15th of July, 1881, and (art. 23) no share was to be transferred until all calls thereon had been paid.

Nearly all the shareholders in the old company entered into the proposed arrangement; but one of them, *Ralph Fletcher*, who was the holder of 700 shares therein, declined to come in under it and take shares in the new company; he was, however, willing to pay £700 on condition of being relieved from certain liabilities which he had incurred in respect of the old company, both as a shareholder and as a guarantor of one of its debts.

On the 5th of July, 1881, *Thomas Fisher*, a shareholder in the old company and a member of the reconstruction committee of the new company, who had then already applied for eighty ordinary and fifty preference shares in the new company, made a further application for shares therein in the following terms: "I hereby request you to allot to me 700 ordinary shares of £5 each, on condition that I am credited with £1 per share paid into a fund by Mr. *Ralph Fletcher*."

On the same day a meeting of the directors of the new company was held at which *Fisher* was present as one of the reconstruction committee, and thereat a resolution was passed allotting (amongst other allotments specified in a schedule or list) eighty ordinary and fifty preference shares to *Fisher*, and also 700 shares to him; and against his name, opposite the 700 shares, was written in the schedule or list the word "conditional."

Another meeting of the directors was held on the 11th of July, 1881, at which also *Fisher* was present, and the minutes of the meeting of the 5th of July were then read and confirmed. Letters of allotment of the eighty and fifty shares were sent to

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him on the 5th of July, the day of the allotment: but no letters of allotment in respect of the 700 shares were ever sent to him; and though certificates of the eighty shares and the fifty shares were sent to him in the month of April following, no certificates of the 700 shares were ever sent to him.

Fisher was however (but without his knowledge) at once entered in the book which the company used as their register of members, not only as holder of the eighty shares and the fifty shares, but also as holder of the 700 shares, and opposite the entry of the 700 was written the word "conditional."

The scheme of arrangement for the reconstruction of the company was duly sanctioned by the Master of the Rolls upon a petition presented for the purpose, and in the list of shares submitted to the Master of the Rolls as having been allotted in the new company were included the 700 shares allotted to *Fisher*.

The payment referred to in the condition to *Fisher's* application had not been made at the date thereof, though it had been in contemplation: but on the 3rd of October, 1881, *Fletcher* paid £700 into the *Liverpool Union Bank* in the names of two persons to be paid over to the company if within two years *Fletcher* was legally relieved from his liabilities in respect of the old company, and otherwise to be repaid to *Fletcher*.

Meanwhile, on the 29th of August, 1881, the new company had begun its business, and on the 6th of September, 1881, *Fisher* sold and transferred to *Henry Sherrington* 400 of the 700 shares, and applied the sale moneys to his own purposes. The transfer of these 400 shares was lodged with the company, but they at first refused to register it upon the ground that the two sums of 10*s*. payable in instalments and making £1 per share provided for by the articles had not been paid up. It was however ultimately registered by the company on the 28th of February, 1882. On the 6th of April, 1882, certificates for 400 shares were issued to *Sherrington*, and he was entered on the register as the holder of 400 shares in the company.

The £700 paid to the suspense account in the names of the two persons above mentioned was never received by the company as *Fletcher* was not relieved from his liabilities within the two years; but on the 30th of December, 1882, *Fisher* and *Sherrington* were,

without their knowledge, credited in the company's books, the first with £300 and the second with £400; and this £700 was debited in the company's books to the *Liverpool Union Bank*, though it was not payable under the circumstances.

In the month of July, 1884, a call was made upon *Fisher* in respect of 300 shares, and upon *Sherrington* in respect of 400 shares, and then for the first time *Fisher* became aware that the company were treating him as the holder of 300 shares with £1 paid up upon them.

A resolution for the voluntary winding-up of the new company was passed in August, 1884, and an order was subsequently made by the Court that the voluntary winding-up should be continued under supervision.

The liquidator of the new company having placed the names of *Fisher* and *Sherrington* upon the list of contributories in respect of 300 and 400 shares respectively, with nothing paid up upon any of them, they, on the 14th of January, 1885, obtained from the Registrar of the Chancery Court of the County Palatine of *Lancaster* an order that their names should be struck off the list of contributories, which order was subsequently affirmed by the Vice-Chancellor of the county palatine.

The liquidator now appealed.

Macnaghten, Q.C., and *Rotch*, in support of the appeal:—

The condition attached to *Fisher's* application for shares in the new company was in its essence a condition subsequent, for he could not be credited with £1 per share until the shares had been allotted to him. He became a shareholder under an allotment *in præsenti* with a collateral agreement containing a condition subsequent. This condition was one which contravened the 25th section of the *Companies Act*, 1867, requiring (subject to the exception therein mentioned) every share in a company to be issued and held subject to the payment of the whole amount thereof in cash; and even if *Fisher* had any right to require the company to perform the condition, or to bring an action to be relieved from the shares, he lost that right by not enforcing it before the winding-up of the company. It is true that no letters of allotment of the 700 shares were sent to him, but he was present

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when the allotment was made to him, and knew of it, and knew also that his name was included in the list furnished to the Master of the Rolls, when the reconstruction scheme was approved, as an allottee of these 700 shares. He moreover sold 400 of these shares, and applied the purchase-moneys to his own use. The condition was for his own benefit, he had the power to waive it, and his conduct constitutes a waiver of any right he ever had to insist upon it, and amounts to a new agreement to take and hold the shares without any condition. As to *Sherrington*, he is either a transferee from a duly constituted shareholder, or there has been a novation, and he is the duly registered absolute holder of 400 shares under a new contract between him and the company.

Whitehorne, Q.C., and *Ralph Neville*, for *Fisher* and *Sherrington*:—

First, as to *Fisher*. The words of the condition, viz., "on condition that I am credited," taken with the facts of the case, shew that it is a condition precedent. They amount to this, "I ask you to allot me 700 shares, but not to allot them until they are credited with the £700 which *Fletcher* says he will pay on being released from his liabilities." This is a conditional application and not a contract to take shares; and the condition is one which was never performed, and the performance of which has now become impossible. It is said that *Fisher* by his conduct has waived the condition. But this is not so. Although the company sent *Fisher* letters of allotment as to the eighty and fifty shares in July, 1881, and the certificates as to those shares in April, 1882, they never sent him any letters of allotment or any certificates whatever as to the 700 shares; and the only allotment of the 700 shares, which *Fisher* knew of, was an allotment marked "conditional," that is subject to this very condition precedent.

Fisher attended the meetings as a member of the reconstruction committee and as the holder of the eighty ordinary shares, and cannot be bound by the unconditional registration which was effected without notice to him. An attempt is made to shew that the condition has been performed, but the entries in the

company's books which are said to have had this effect were purely fictitious (as the company never had what they purported to credit and debit), and were never communicated to *Fisher*.

As laid down in *Buckley* on the Companies Acts (1), citing *Ex parte Preston and Henry* (2), "the test whether an applicant is liable to be placed on the list of contributories is whether specific performance of the agreement to take the shares could have been decreed against him." Applying this test and the principles of *Pellatt's Case* (3) and *Simpson's Case* (4), *Fisher* cannot be put upon the list of contributories in respect of the 300 shares, for he only agreed to take the 700 shares subject to a condition precedent which has not been performed, and either was *ultrà vires* the directors, and therefore not binding on *Fisher* for want of mutuality, or *intra vires* the directors and incapable of performance, and so not enforceable against him. And if he is held liable, it will be in respect of something which he never bargained for and now can never get.

As to *Sherrington*, he only bought what *Fisher* could sell, *i.e.*, shares with £1 paid. The transfer was in the face of the 23rd of the articles of association prohibiting transfer until the £1 per share called up had been paid, and as he stands in *Fisher's* shoes he is entitled to say that the shares were never allotted to him, that the company could not credit him with £1 per share, and that there never was any contract between him and the company which could be enforced against him.

Morton's Case (5) does not apply, as the company here knew that the allotment was conditional.

FRY, L.J.:—

I have been requested by the Lords Justices to give the first judgment in this case, and Lord Justice *Lindley*, who is not present to day, agrees in the conclusion which I am about to state. [His Lordship then stated shortly the facts of the case, and after remarking that the £1 per share referred to in the condition of *Fisher's* application obviously related to the two sums of 10*s.* per

(1) 4th Ed. p. 59.
(2) 15 L. T. (N.S.) 496.
(3) Law Rep. 2 Ch. 527.
(4) Ibid. 4 Ch. 184.
(5) Law Rep. 16 Eq. 104.

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share payable in instalments of those amounts during the month of July, 1881, continued:—]

Now, that being the nature of the transaction between the parties, and taking Mr. *Fisher's Case* first, the question is, whether he is to be treated as a contributory to the new company now being wound up, or in other words, whether he satisfies the language of the 23rd section of the Act of 1862, which defines a member of a company as being "a person who has agreed to become a member of a company under this Act, and whose name is entered on the register." I may say at once that Mr. *Fisher's* name was on the register, and therefore the only inquiry which remains is, whether or not he had agreed to take shares. That depends upon the true construction to be put upon his proposal or application, and upon what took place on the acceptance of his proposal. In the first place then, simply looking at the terms of the proposal or application, it appears to me that the condition was in its nature a condition subsequent and not a condition precedent. The condition I read to be one which provides for the payment, at some future time, of sums which were to become due at a future time on shares which were to be allotted in pursuance of that proposal. Instead, therefore, of the things contemplated by the condition being things which could be done before the allotment of shares, they were things which in their nature must be done after the allotment of shares, and they were things which could not be done unless shares were allotted, for unless the shares were allotted, there was no obligation to pay the sum at all. In its nature, therefore, the condition was a condition subsequent and not a condition precedent.

It next becomes material to consider what was done by the company to whom this proposal was tendered. On the same 5th of July, 1881, a meeting of the directors of the new company was held, at which Mr. *Fisher*, although not a director of the new company, was nevertheless present in his character of a member of a committee of shareholders which had been appointed to have the conduct of these matters, and at that meeting a resolution was passed "That the following persons be, and they are hereby allotted the number of ordinary shares of £5 each, and the number of preference shares of £5 each written opposite their

respective names." Now, pausing there, it is obvious that the intention of that resolution was to make a definite and conclusive allotment of the shares which are mentioned in the subsequent schedule. In that subsequent schedule or list appears the name of Mr. *Fisher* twice over, once in respect of the other shares which he had applied for, and once in respect of the 700 shares, the application for which I have read. Against his name in respect of that last application the word "conditional" was inserted. Now, I pause to consider what is the nature of this entry to which I think Mr. *Fisher* must be deemed to be privy; and it appears to me that the effect of the resolution plainly is to allot the shares to Mr. *Fisher*, but to make that allotment conditional on some unexpressed condition. It is obvious that if the condition had been a condition precedent, there ought to have been no present allotment of shares, whereas if the condition was a condition subsequent, the present allotment of the shares, and the statement that there was a condition, was a proper and appropriate mode of conducting the business. I will also mention that the resolution to which I have referred was not only passed in the presence of Mr. *Fisher*, but that at a later date, I think the 11th of the same month of July, he was present at another meeting of the directors (and he seems to have been present at all the meetings held about this time), at which the minutes of the meeting of the 5th of July were read and confirmed. I think, therefore, that there was a proposal with a condition subsequent, that the proposal was accepted with the condition, by the company, and that there are accordingly the elements of a present contract to take the shares.

It is not immaterial in the next place to consider (as it is admissible to do when there is any ambiguity in the language of a contract) how the parties to this contract behaved in pursuance of it. Taking the company first, what we find is this, that the company not only pass this resolution, but they enter Mr. *Fisher* in his proper order in the share register, and allot to him 700 shares with specific numbers. Not only do they do that, but they at a subsequent date allow him to act as a shareholder by transferring the shares. It appears to me, therefore, that they act as if the allotment had been a definitive one.

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Then, how does Mr. *Fisher* act? Not only is he present on the occasions I have referred to, but he allows the company (and this is not immaterial) in the petition for the confirmation of the reconstruction scheme to state to the Master of the Rolls that the shares have been allotted to him in the manner I have already mentioned, a statement which was perfectly correct if the condition was a subsequent one, but very incorrect, and not consistent with fair conduct on the part of Mr. *Fisher*, if the condition was one which defeated the allotment or suspended it. Not only does he do that, but in September following he sells 400 of these shares to Mr. *Sherrington*, and he receives for those shares the sum of £340, and when he subsequently learns that the £700 has not been credited it does not appear that he made any repayment of the £340 to Mr. *Sherrington*, or in any way signified to him, as every honest man would have done, that he had no right to transfer the shares. Whether, therefore, we look at the conduct of the company, or at the conduct of Mr. *Fisher*, we arrive at the same conclusion as that arrived at from the mere naked construction of the agreement itself. The result is that there was an agreement that Mr. *Fisher* should become a shareholder, that his name was entered on the register of members, and, accordingly, that the two conditions which the 23rd section prescribes as constituting a shareholder are satisfied in his case.

There is one other observation which I desire to make. It may well be that Mr. *Fisher* may have had a right to call upon the company while it was a going concern to perform the condition which he imposed when he took these shares, or to rescind, and put an end to the agreement. But if he had any such equity or any such right, that equity and that right have been lost by his allowing the winding-up of the company to take place before he enforced it, and therefore, without expressing any concluded opinion as to whether he may have any right to enforce the performance of the condition, it seems to me that even if the contract was capable of being avoided when the company was a going concern, it ceased to be so the moment the winding-up order was made. The question how far Mr. *Fisher* would be liable for the £5 a share is not open on the present occasion. So far as the discussion has gone I am unable to see any ground

upon which he can contend that he is not liable for the whole amount, but that may be a point upon which it would be wrong to prejudice any argument which Mr. *Fisher* may desire to raise.

I now come to the case of Mr. *Sherrington*, who was the transferee of 400 of the shares from Mr. *Fisher*. In one respect I think his case is better than Mr. *Fisher's*, for, after receiving from the company certificates of shares which stated that £1 per share had been paid upon them, he may be in a position to argue (and for aught I see, to argue successfully) that he has evidence which is good against the company that the £1 per share was paid in cash. The case in the House of Lords of *Burkinshaw* v. *Nicolls* (1), certainly seems strong in favour of that contention, but it is only incidentally that the point arises before us, and we are not now determining the amount of Mr. *Sherrington's* liability. In other respects it appears to me that Mr. *Sherrington's* position is weaker than that of Mr. *Fisher*, because, even if the conclusion at which I have arrived with regard to Mr. *Fisher* is not the correct one, I think it would be very difficult for Mr. *Sherrington* to contend that there was not a novation entered into by the arrangement between himself, Mr. *Fisher*, and the company under which he became the absolute holder of 400 shares, independently of any condition which might have attached to the original contract.

But having come to the conclusion that no such condition precedent did attach to the original contract, the question of whether there was any such further contract between Mr. *Sherrington* and the company becomes one upon which it is not necessary to express any opinion. For these reasons I am unable, and my learned brethren, I may say, are equally unable, to agree with the decision arrived at by the learned Judge in the Court below, and, therefore, this appeal must be allowed. There is one other observation I will add, which is this: The learned Judge has expressed the opinion that the question must be treated as if it arose in an action for specific performance. There are many cases in which the consideration whether specific performance can be granted is a very material one, but where the official liquidator shews that all the predicates which according to the 23rd section constitute a shareholder exist, that is to say, where the person in

(1) 3 App. Cas. 1004, 1016, 1017.

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question has entered into a concluded agreement and his name is on the register of shareholders, I am not satisfied that there the case can be treated as if it were a contract resting *in fieri*. For the reasons I have given I think the official liquidator has satisfied the terms of the 23rd section, and that these two gentlemen should be placed upon the list of contributories.

BAGGALLAY, L.J.:—

I entirely agree with the judgment which has been pronounced by Lord Justice *Fry*, and as we had an opportunity of discussing the question during the interval since the Court rose, I am in a position to say that Lord Justice *Lindley* takes the same view.

Solicitors: *Pritchard, Englefield, & Co.*, for *A. S. Mather, Liverpool; Kime & Hammond*, for *Buck, Dicksons, & Cockshott, Southport.*

W. W. K.

C. A. 1885 Nov. 11.

In re PARRY AND DAGGS.

Will—Executory Devise—Repugnancy—Death of Devisee leaving Issue—Period of happening of Contingency.

A testator devised real estate to his son and his heirs; and then declared that in case his said son should die without leaving lawful issue, then and in such case the estate should go to his son's next heir-at-law, to whom he gave and devised the same accordingly:—

Held, that the contingency of death without leaving issue was not confined to death in the lifetime of the testator, but referred to death at any time; and that the gift over was repugnant and void; and that the devisee took an absolute estate in fee simple.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* on a question of title submitted to the Court under the *Vendor and Purchaser Act*, 1874.

Thomas Croose Parry, by his will, dated the 27th of November, 1878, devised certain property to his son, *Thomas Croose Parry*, in the following terms:—

"I give and devise unto my said son, *T. C. Parry*, and his heirs, the manor, or reputed manor, of *Birley*," &c. (describing the property). And after charging the estate so devised with

the payment of certain sums of money, the testator proceeded as follows:—"And I hereby declare and direct that in case my said son *T. C. Parry* shall die without leaving lawful issue then and in such case the estate and premises hereinbefore devised to him shall go to his next heir-at-law, to whom I give and devise the same accordingly."

The testator died on the 11th of June, 1881. *T. C. Parry*, the son, was married, but had no issue living. He contracted to sell a portion of the estate devised to him to *W. Daggs*. The purchaser objected that, according to the true construction of the will, the vendor was tenant in fee [simple with an executory devise over on his death without issue. The vendor contended that the executory devise over was void, and that the vendor had an absolute estate in fee simple.

The parties accordingly submitted the point to the Court under the *Vendor and Purchaser Act*, 1874. The Vice-Chancellor held that the executory devise over was void, and he was further of opinion that the devise over was only intended to take effect on the death of *T. C. Parry* in the lifetime of the testator. He therefore decided that the vendor had an absolute estate in fee simple. From this decision the purchaser appealed.

Stallard, for the Appellant:—

First, the contingency of death without leaving issue applies to death at any time, and is not confined to death in the lifetime of the testator, *Edwards* v. *Edwards* (1); *O'Mahoney* v. *Burdett* (2), unless there are directions in the will inconsistent with that construction. Here there are no words in the will inconsistent with such a construction. On the contrary, if the testator had intended the devise over to take effect in his lifetime he would have named a second devisee instead of leaving the estate to his son's next heir-at-law.

Secondly, the executory devise is not repugnant to the original gift in any other sense than that in which every executory devise is repugnant to the original devise, namely, as putting an end to it: *Holmes* v. *Godson* (3); *Shaw* v. *Ford* (4). The words "next

(1) 15 Beav. 357.
(2) Law Rep. 7 H. L. 388.
(3) 8 D. M. & G. 152.
(4) 7 Ch. D. 669.

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heir-at-law" are not merely words of limitation; they designate a particular person.

Rawlins, for the vendor:—

With respect to the first point, the rule laid down in *O'Mahoney* v. *Burdett* (1) is only a *primâ facie* rule. The intention of the testator must govern the construction. In the present case it is probable that the testator, knowing that if his son died in his lifetime leaving issue the devise could not lapse under the 26th section of the *Wills Act*, made the devise over to prevent the gift lapsing if his son died without issue.

Secondly, we contend that even if the contingency was to take effect on the son's death at any time, the gift over is repugnant to the absolute gift which precedes it. It is not an executory devise properly speaking for an executory devise alters the devolution of the estate: *Jarman* on Wills (2). This devise does not alter the devolution of the estate, for it is to go to the next heir-at-law. It amounts simply to a direction that the first devisee should not alienate the estate in his lifetime and shall die intestate: *Gulliver* v. *Vaux* (3); *Murray* v. *Jones* (4). But we also contend that the words "next heir-at-law" are not the designation of a person but words of limitation. In that view the effect of the gift is to give the son the fee in any event: *Fuller* v. *Chamier* (5).

Stallard, in reply.

FRY, L.J.:—

The question which we have to determine in this case arises on the will of *T. C. Parry*, by which he gave certain real estate to his son and his heirs, and then proceeded as follows: "And I hereby declare and direct that in case my said son, *T. C. Parry*, shall die without leaving lawful issue, then and in that case the estate and premises hereby devised to him shall go to his next heir-at-law, to whom I give and devise the same accordingly."

(1) Law Rep. 7 H. L. 388.
(2) 4th Ed. vol i. p. 865.
(3) 8 D. M. & G. 167, n.
(4) 2 V. & B. 313.
(5) Law Rep. 2 Eq. 682.

T. C. Parry, the son, has succeeded to his father's property, and has made a contract for sale of part of it. The purchaser objects to his title, and we have now to decide on the force of his objection. The purchaser's objection depends upon the validity of the gift over by executory devise. Several points have been argued before us respecting the construction of this devise. In the first place, it was argued that the gift over was to take effect only in the case of the devisee dying in the lifetime of the testator. In my opinion that construction cannot prevail. When property is absolutely given to a person, and then there is a gift over in the event of the devisee dying, with no further words, it is obvious that some words must be imported to define the contingency intended by the testator. Death in itself is not a contingency, and, therefore, we must imply words to make contingent the event which has been spoken of as contingent by the testator. Where there is no antecedent estate the contingency is referred to death in the lifetime of the testator; and, according to the decision in *Edwards* v. *Edwards* (1), when the gift in fee is preceded by a life estate, the contingency has been held to refer to the death of the donee, either during the preceding life estate or in the lifetime of the testator. But here the gift over is not on a certain event, for death is coupled with the contingency of not leaving issue. Therefore, there is no need to import any words: and consequently there is no necessity for limiting the event to the lifetime of the testator.

It has been argued that the words "next heir-at-law" are not words of purchase but of limitation. To that argument I am not able to accede. The testator has in the earlier clause accompanied his devise with proper words of limitation: and I think that it would be a strained construction of the clause to hold these words, which are properly words of purchase, to be words of limitation. I may further observe this, the testator has added express words of devise to the next heir, "to whom I give and devise the same accordingly." That argument, therefore, cannot be maintained.

Then it was lastly argued that the gift over cannot take effect as an executory devise, because the only operation of it would

(1) 15 Beav. 357.

C. A. 1885 *In re* PARRY AND DAGGS. Fry, L.J.

be to give an estate in fee simple to the heir, who would have taken the same estate if there had been no such gift; that, therefore, it is a gift which would not alter the devolution of the estate, but that its only effect would be to prevent the alienation of the estate, and that it is therefore invalid. From the earliest times the Courts have always leant against any device to render an estate inalienable. It is the policy of the law always to make estates alienable, and it is immaterial by what device it is attempted to prevent an owner from exercising the power of ownership. This lies at the foundation of the rule in *Shelley's Case* (1), in which words appearing to convey an independent gift were construed to be words of limitation. In the present case the testator's son is devisee in fee, and on his death either one of his issue will be his heir or some one else. If his heir be his issue, such issue will take under the original devise and the gift over does not arise: if his heir be some one not his issue, such heir would take equally under the original devise and under the gift over: so that the operation of the gift over, if it be valid, is not to alter the devolution of the estate, but only to fetter the power of alienation during the lifetime of the son. That was an illegal device, and consequently the gift over is void. I am, therefore, of opinion that the Vice-Chancellor's decision was right, and the title is good. The appeal must be dismissed with costs.

SIR J. HANNEN and BOWEN, L.J., concurred.

Solicitors: *Grundy, Izod & Grundy*, agents for *C. D. & H. Andrews, Leominster; Twisden & Co.*, agents for *W. T. Sale, Leominster.*

(1) 1 Rep. 93 a.

M. W.

In re CLITHEROE ESTATE.

C. A. 1885 Nov. 13, 14; Dec. 1.

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 5; *s.* 56, *sub-s.* 2; *s.* 58, *sub-s.* 1, *cl. vi. and ix.—Person having Powers of Tenant for Life—Trust for Accumulation—Person not entitled to Possession.*

A testator by will dated in 1883 devised an estate to the use of trustees for a term of 1300 years and subject thereto to his son *H. S.* for life, with remainders over in strict settlement. The trusts of the term were to raise portions, to pay annuities, *H. S.* being one of the annuitants, and to apply the residue as a sinking fund to pay off mortgage debts and other charges. It was estimated that the trusts of the term would require from fifteen to twenty years for their fulfilment. The testator directed that the trustees should "during the continuance of the last-mentioned trusts" enter into and hold possession of the rents and profits of the estate "and not deliver the same to any person beneficially interested in any part thereof," and should manage the estate as therein mentioned. Very full powers of management were given to the trustees, provided that when all the trusts of the term should have been fully paid and satisfied the term should cease. He, moreover, gave to the trustees such other powers over the estate as were given to a tenant for life in possession by the *Settled Land Act*, 1882:—

Held (affirming the decision of *Bacon*, V.C.), that *H. S.* was a person having the power of a tenant for life of the estate within the meaning of sect. 58, sub-sect. 1, cl. ix. of the *Settled Land Act*, 1882, and that his consent was necessary under sect. 56, sub-sect. 2, to the effectual exercise by the trustees of the powers of sale and enfranchisement contained in the will.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* upon a petition presented by the Hon. *James Archibald Douglas Home, Frederick Iltid Nicholl*, and *Henry Frederick Nicholl*, under sect. 56, sub-sect. 3, of the *Settled Land Act*, 1882, praying for the opinion, advice, and direction of the Court (1).

The settlement was made by the will of the late *Walter Francis* Duke of *Buccleugh and Queensbury*, dated the 8th of August, 1883.

The provisions of the will are so fully set forth in the previous report that it will be sufficient to state the general effect of them. The testator thereby limited and appointed the *Clitheroe* estate to the use of the Petitioners for a term of 1300 years on certain trusts, and from and after the expiration or sooner determination of the

(1) 28 Ch. D. 378.

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term, then to his second son Lord *Henry Scott* for life, with remainder to his first and other sons in tail male.

The trusts declared were: first, to raise certain portions for other children; secondly, to raise the interest upon certain sums charged on other estates at 5 per cent.; thirdly, to set apart out of the rents and profits an annuity to Lord *Henry Scott*, which was to be raised in certain events; and, fourthly, to accumulate the surplus of the rents and profits as a sinking fund for the discharge of certain debts and charges amounting in the whole to over £160,000, and there was a direction that the trustees should enter into and hold possession of the rents and profits of the *Clitheroe* estate and not deliver the same to any person beneficially interested in any part thereof. Large discretionary powers of management were given to the trustees, and finally they were to have such other powers over the *Clitheroe* estate as are given to a tenant for life in possession by the *Settled Land Act*, 1882, and "as extended by this my will."

The testator died on the 16th of April, 1884, and his will was duly proved by his eldest son the present Duke of *Buccleugh* and the Petitioner *James Archibald Douglas Home*, whom he had appointed his executors.

The Petitioners on the death of the testator entered into possession of the *Clitheroe* estate in pursuance of the directions of the will. The net rents and profits of the estate amounted on the average to about £26,000 a year, and the debts and charges directed to be liquidated under the trusts of the term of 1300 years amounted to a principal sum of £160,000 in addition to the yearly sum payable out of the rents and profits. It was reckoned that the trusts of the term would require for their accomplishment a period of from fifteen to twenty years.

The Petitioners had agreed with the tenants of some of the copyhold hereditaments for the sale to them of the freehold and inheritance of the copyholds so as to effect an enfranchisement thereof: and some of the purchasers having objected to the title on the ground that the consent of Lord *Henry Scott* was necessary to the sale, and the said Lord *Henry Scott* having declared that he intended himself to exercise the powers given to a tenant for life, the following questions were submitted to the Court:—

1. Whether the Petitioners as trustees of the term of 1300 years in the *Clitheroe* estate were or were not entitled during the continuance of the said term to sell the freehold of the said copyhold hereditaments, and generally to exercise the powers expressed to be conferred on them by the said will for any purpose provided for in the *Settled Land Act*, 1882, without the consent of the said Lord *Henry Scott*.

2. Whether the said Lord *Henry Scott* during the continuance of the trusts of the said term of 1300 years is to be deemed a tenant for life or a person having the power of a tenant for life of the *Clitheroe* estate within the meaning of the *Settled Land Act*, 1882.

The Vice-Chancellor decided that Lord *Henry Scott* was during the continuance of the trusts of the term of 1300 years to be deemed a tenant for life, or a person having the powers of a tenant for life of the *Clitheroe* estate within the meaning of the Act; and that the trustees of the term were not entitled to sell the estate or exercise the powers for that purpose provided for by the Act without his consent.

From this decision the Petitioners appealed.

The arguments before the Court of Appeal were the same as those used before the Vice-Chancellor, which are fully given in the previous report.

Spencer Butler, for the Appellants, cited *In re Hazle's Settled Estates* (1); *In re Strangways* (2) *Fearne's* Contingent Remainders (3); *Boraston's Case* (4); *Tregonwell* v. *Sydenham* (5); *In re Atkinson* (6); and referred to the *Settled Land Act*, 1882 (45 & 46 Vict. c. 38), s. 2, sub-s. 5; s. 56, sub-s. 2; s. 58, sub-s. 1, cl. vi. and ix.

R. J. Cust, for Lord *Henry Scott*, cited *In re Jones* (7), and commented on the same sections of the *Settled Land Act*.

Spencer Butler, in reply.

(1) 26 Ch. D. 428; 29 Ch. D. 78.
(2) W. N. 1885, p. 191.
(3) 10th Ed. p. 2.
(4) 3 Coke, 19 a; S. C. *Tudor's* Real Property Cas. 1st Ed. p. 653.
(5) 3 Dow. 194.
(6) 30 Ch. D. 605.
(7) 24 Ch. D. 583; 26 Ch. D. 736.

C. A. 1885. Dec. 1. SIR JAMES HANNEN:—

1885

In re CLITHEROE ESTATE.

The questions raised for our determination on this appeal are: 1st, Whether Lord *Henry Scott* is, within the meaning of the 2nd section of the *Settled Land Act*, 1882, tenant for life of certain lands settled by the will of his father, the late Duke of *Buccleugh*; or, 2ndly, Whether he is a person having the powers of a tenant for life within the 58th section of the same Act. If either of these questions is answered in the affirmative this appeal fails.

The provisions of the settlement are very fully set out in the report of the case before Vice-Chancellor *Bacon*, and it is only necessary for me on this occasion to give the effect of those provisions. [His Lordship stated the effect of the will as stated above, and proceeded:—]

The definition of a tenant for life is given in sect. 2 of the Act, sub-sect. 5: "The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement."

By the 7th sub-section it is enacted that "a person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent."

With reference to the clause in the settlement to which I have referred, giving the trustees powers of the tenant for life under the *Settled Land Act*, it appears to me that if Lord *Henry Scott* be tenant for life within the definition so given, then that provision that the trustees should have the powers of the tenant for life would be void by virtue of the 51st section, which enacts that "If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any

condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void." It appears to me that it is impossible, having regard to the scope and objects of this Act, that the powers of a tenant for life can be vested at the same time in trustees and in the person who would otherwise be tenant for life. But this, as I have said, depends on whether Lord *Henry Scott* is tenant for life, or has the powers of a tenant for life. I am not prepared to give a definite opinion upon the question whether he is a tenant for life, and I do not think it necessary to do so, because I am of opinion that if he is not tenant for life he is a person having the powers of a tenant for life under the 58th section.

That section enacts that "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were tenant for life as defined by this Act."

Then clause vi., which has been particularly referred to, says that "A tenant for his own or any other life, or for years determinable on life, whose estate is," among other things, "subject to a trust for accumulation of income for payment of debts or other purposes," is to have the powers of a tenant for life.

Now the language of this section is peculiar, and I think it is not in accordance with ordinary phraseology to say that a tenant for life whose estate is subject to a trust for accumulation of income is in possession; but the section assumes that it may be so, and I think that such a construction must be put upon it as will give effect to the section upon that assumption.

Now this seeming inconsistency has been dealt with and explained in the case of *In re Jones* (1). Lord Justice *Lindley* at p. 744 of the report of that case says: "It at first struck me as doubtful whether a person in that position could be said to have any estate or interest in possession, the words 'in possession' in sect. 58 being obviously used by way of distinction from 'in

(1) 26 Ch. D. 736.

C. A. 1885 *In re* Clitheroe Estate. Sir J. Hannen.

remainder or reversion.' But when we look further into the Act it seems obvious that a term of years, whatever its length be, when it is merely a security for charges, is not such an interest as prevents the person entitled to the income subject to that charge from being in possession within the meaning of sect. 58." That is precisely the position of Lord *Henry Scott*, he is tenant for life, subject to the charges and subject to the term—the term being merely security for the charges. Nothing stands in the way of his receipt of the rents and profits but the charges, which he might at any time redeem, and therefore, on the authority of that case, his interest, though subject to those charges, is in possession within the meaning of sect. 58.

For these reasons it appears to me that we must answer the questions submitted to the Court as follows:—

First, that the trustees are not entitled during the continuance of the term to deal with the estate in manner proposed without the consent of Lord *Henry Scott*; and

Secondly, that Lord *Henry Scott* is to be deemed a tenant for life or a person having the powers of a tenant for life of the estate, and therefore that the appeal must be dismissed.

Fry, L.J.:—

I concur in the conclusion arrived at by the learned President.

The first question of course arises on the 2nd section of the Act. With regard to that, I would merely say, as at present advised, I am not satisfied that Lord *Henry Scott* is within the meaning of the Act a tenant for life. I incline to think that the fact of the term which takes precedence of his interest being one for the management of the estate and one which requires the trustees to take possession of the estate and keep that possession for the purposes of accumulation, does prevent him being a person beneficially entitled to possession of the estate. On that point I do not desire to express any concluded opinion. I abstain from expressing that opinion, because I concur in the view that Lord *Henry Scott* is clearly a person who under the 58th section of the Act is entitled to the powers of a tenant for life under the Act.

Now the first difficulty which occurs arises on the words of definition with which that section commences: "Each person as

follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act." It is said that the estate or interest of Lord *Henry Scott* is not in possession, because it is preceded by a term of 1300 years.

But clause vi. of the section itself shews that the Legislature contemplated an estate being in possession within the meaning of the Act which nevertheless is preceded by a trust for accumulation.

Now to what does the trust for accumulation attach? Plainly to some antecedent estate—a term, or some larger interest vested in trustees anterior to the estate of the person in possession. It is clear, therefore, whatever may be the proper force of the words "in possession" ordinarily used in reference to estates, that under this section of the Act the fact of there being an antecedent interest which supports a trust for accumulation does not prevent the subsequent estate from being treated as in possession.

The next point is this: It is said if that be so, nevertheless having regard to the existence of this term, which is not merely a trust for accumulation, but for other purposes, the estate of Lord *Henry Scott* is not in possession. What, then, shortly, are the objects of the term? Its objects are twofold. In the first place it is to secure certain annuities to members of the family. In the next place it is to provide by means of what is called the sinking fund an accumulated fund for the payment of certain charges and principal sum.

It performs the duties therefore of an ordinary term to secure an annuity, and of a term for the purpose of an accumulation fund. Now, that a mere term creating an incumbrance in the nature of an annuity does not prevent the estate being in possession was determined by the decision, *In re Jones* (1). That a trust for an accumulation would not prevent an estate being one in possession within the meaning of this section of the Act appears from clause vi. of the section itself. Therefore, I conclude that the term in neither of its objects prevents Lord *Henry Scott's* estate being, within the meaning of this section of the Act, one in possession. I therefore agree that this appeal should be dismissed.

(1) 24 Ch. D. 583; 26 Ch. D. 736.

C. A. 1885 *In re* CLITHEROE ESTATE.

I am authorized by Lord Justice *Bowen* to say that, having considered the case, he concurs in the judgment which we have pronounced.

Cust said the petition being a friendly one, the payment of costs had been agreed upon by the parties.

Solicitors for all parties: *Nicholl, Manisty, & Co.*

M. W.

C. A. 1885 *Nov.* 23.

In re HIGGINS. DAY *v.* TURNELL.

[1884 H. 4404.]

Settlement—Covenant by Settlor for Payment of a sum of Money during his Life or after his Death—"Free from all Deductions"—Succession Duty Act (16 & 17 *Vict. c.* 51), *ss.* 1, 42, 44 [*Revised Ed. Statutes, vol. xi., pp.* 595, 604, 605]—*Legacy Duty Act* (36 *Geo.* 3, *c.* 52), *s.* 6 [*Revised Ed. Statutes, vol. iii., p.* 401].

The father of a married woman covenanted with trustees for payment to them at such time or times during his life as he should think fit, or within twelve calendar months after his death, of the sum of £10,000 "free from all deductions whatsoever," and for payment to them in the meantime of an annuity of £200, the principal sum and the annuity to be held upon the trusts therein mentioned for the daughter and her family. The covenantor did not pay any part of the £10,000 in his lifetime, but after his death his executor paid to the trustees the full sum of £10,000. The Crown claimed succession duty from the trustees, who paid it, and claimed repayment from the executor on the ground that the £10,000 was to be paid free from all deductions. Both parties agreed that the fund was liable to succession duty, and argued the case on that footing. *Bacon*, V.C., decided that the fund, and not the covenantor's estate, must bear the duty if payable:—

Held (affirming the decision of *Bacon*, V.C.), that if the duty was payable it must be borne by the fund, for that the relation between the trustees and the executor was simply that of creditors and debtor, that the executor was not liable to be called on by the Crown for the duty, and that when he had paid the £10,000 in full to the trustees, he had discharged his testator's obligation, and was not concerned with the question whether succession duty was payable.

Whether any succession duty was payable on the death of the covenantor, *quære*.

THIS was an appeal by the Plaintiffs from a decision of Vice-Chancellor *Bacon* (1).

(1) 29 Ch. D. 697.

By an indenture of settlement dated the 5th of May, 1879, *Henry Higgins* covenanted with the trustees "that he, the said *H. Higgins*, will at such time or times during his life as he shall think fit, or within twelve calendar months after his death, pay to" the trustees or trustee of the settlement "the sum of £10,000 sterling free from all deductions whatsoever," and that in the meantime and until the £10,000 was paid, *Higgins*, his heirs, executors, or administrators, would pay to the trustees an annuity of £200. Trusts were declared of the £10,000 and the annuity for the benefit of the covenantor's daughter, Mrs. *Day*, and her family.

Higgins died in August, 1881, without having paid the £10,000, and in June, 1883, the executor paid it to the trustees of the settlement. The Crown claimed succession duty, which the trustees paid, and the question now was whether they could recover it from the executor. Vice-Chancellor *Bacon* expressed doubts whether succession duty was payable at all, but held that if it was payable it must be borne by the £10,000 and not by the testator's estate. The Plaintiffs, the trustees of the settlement, appealed, and the appeal was heard on the 23rd of November, 1885.

Marten, Q.C., and *Dunham*, for the Appellants:—

[LORD HALSBURY, L.C.:—Is succession duty payable at all?]

It was agreed by both parties in the Court below that it was payable, and we were not called upon to argue that point.

[LORD HALSBURY, L.C.:—Suppose we should be of opinion that it was not payable, how are we to decide the question who is to pay it?

FRY, L.J.:—Do you agree as to the clause under which it is payable?]

Yes.

[*W. Pearson*, Q.C., for the executor:—The point whether succession duty was payable was considered to be concluded by *In re Micklethwait* (1) and *Lord Advocate* v. *Roberts' Trustees* (2).]

[THE COURT expressed doubt whether those cases settled the

(1) 11 Ex. 452. (2) 20 Scotch Sess. Cas. 2nd Series, 449.

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point, but said that the argument might proceed, and they would see whether the case could be disposed of without deciding that question.]

We contend, then, that the obligation under the covenant to pay the £10,000 clear of all deductions whatever obliges the executor to pay it free from any deduction for duties of any kind, just as when a legacy is given free from all deductions, it must be paid free from legacy duty.

[FRY, L.J.:—The executor is the person who has to see that the duty is paid.]

So, in the present case, we say it was the duty of the executor to see that the succession duty was paid, so that the £10,000 might be subject to no deductions.

[LINDLEY, L.J.:—Could the Crown have called on the executor to pay the duty?]

We say that it could. Sect. 44 makes various persons beside the successor liable to pay, and among them is included "every trustee . . . in whom . . . any property . . . subject to such duty shall be vested." Then by sect. 1 it is provided that "property" shall include real and personal property, and that the term "personal property" shall include "money payable under any engagement," and "the term 'trustee' shall include an executor and administrator." This executor is, then, a trustee in whom property subject to succession duty is vested, and by sect. 44 is liable to the duty and entitled to retain it out of the property. This case cannot be dealt with as a simple case of debtor and creditor, which is what the Vice-Chancellor has done; it is a settlement by which the wife's father is to settle £10,000 free from any deductions. If it were a simple case of debtor and creditor, there would be no succession duty at all. Suppose there were no stipulation that the person was to be paid free from all deductions, it would be the duty of the executor to deduct the duty before paying the sum to the trustees. The effect of a direction that money shall be paid free from all deductions, was fully considered in *In re Bannerman's Estate* (1).

[FRY, L.J.:—I feel difficulty in seeing that this is property on

(1) 21 Ch. D. 105.

which duty is payable while in the hands of the executor. How can it be subject to duty in the hands of the payer?]

As soon as the predecessor dies, his executor has in his hands money which is payable under an engagement, and duty can be claimed from him before he hands it over, just as he has to deduct the duty on a legacy.

[FRY, L.J.:—The *Legacy Duty Act* provides for the liability of the executor.]

We say that the effect of clause 44 of the *Succession Duty Act* is the same.

[FRY, L.J.:—The right to receive money is property of the payee, you are asking us to hold that the obligation to pay money is property in the hands of the payer.]

The Act includes in the term "trustee" a person taking on himself the administration of any property, and the executor had the administration of this money. The settlor had the option to pay during his life; he elected not to do so: if he had paid during his life, no succession duty would have been payable, and if he delays so that duty is payable, his covenant that the sum shall be paid free from deductions is not kept unless his estate pays the duty.

W. Pearson, Q.C., *Millar*, Q.C., and *W. N. Lawson*, for the executor:—

The relation between the covenantor and the covenantees was simply that of debtor and creditor. The executor has paid to the trustees of the settlement £10,000 in full. The question is whether he has not fulfilled the covenant. After the payment the Crown called on the trustees, not on the executor, for payment of duty. Then the trustees call upon the executor to pay them something more, viz., the amount of the duty. The argument of the Appellants goes to prove too much, viz., that if the settlor had paid the £10,000 to the trustees in his lifetime, his estate would have been liable to pay succession duty, for it is a fallacy to say that no duty would have been payable: it clearly would have been payable as soon as the tenant for life under the settlement died. We say that the relation is purely that of

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debtor and creditor, and that the executor has nothing to do with the succession duty.

[They were then stopped by the Court.]

Marten, in reply:—

The question is what the settlor covenanted to do, and I submit that he covenanted for payment of a sum clear from all demands for duty.

LORD HALSBURY, L.C.:—

I must protest against an artificial agreement between the parties by which we are to construe the instrument according to a view of the law to which at present I do not assent. I do not mean to decide whether succession duty was payable or not, but it is not reasonable that we should be called upon to construe the instrument upon an agreement between the parties that the duty shall be considered to be payable. I shall deal with the settlement simply as it stands. I think the covenant only means that the £10,000 shall be paid in full, by which I mean that nothing which the testator himself or his estate could claim against it should be set off against the sum, and I think that it has no reference to succession duty or to any claim of the Crown for duty. The appeal must therefore be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. There is a plain distinction between legacy duty and succession duty in this respect—the *Legacy Duty Act* provides that the executors shall be liable to see to payment of the duty, the *Succession Duty Act* does not contain a similar provision applicable to sums which an executor has to pay under a covenant. Mr. *Marten's* argument is that sect. 44 makes both the trustees of the settlement and the executor of the covenantor liable to see to the payment of the duty. I understand the section as the advisers of the Crown appear to have understood it, and think that the trustees of the settlement, when they have received the money, are the persons to see to the payment of the duty, and that the executors of the covenantor have no concern with it. All that the executors have to do is to hand

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over to the trustees the clear sum of £10,000, and when they have done that, they have no further duty in respect of it. It would be startling to say that when the first tenant for life dies there is to be another claim against the executors of the covenantor for duty. I think the covenant only means, "I or my executors will pay to the trustees £10,000, from which neither I nor they shall be entitled to make any deductions."

FRY, L.J.:—

I am of the same opinion. It appears to me that if succession duty is payable on this fund it is under sect. 42, which makes the duty a charge on the interest of the successor, and I cannot see that the predecessor was in any way liable to it. I think, therefore, that the decision of the Vice-Chancellor was right.

Solicitors: *Pritchard & Marshall*, agents for *G. R. Rogerson & Co., Liverpool; J. H. Johnson.*

H. C. J.

In re GARNES. GARNES *v.* APPLIN.

C. A. 1885 *Nov.* 24, 25.

[1885 G. 365.]

Practice—Form of Decree as to Moneys received by Trustee during his Infancy.

By articles of settlement on the marriage of Mr. and Mrs. *G.* in 1874, it was agreed that the wife's property should be vested in a trustee or trustees to be approved of by *G.* and wife, upon the usual trusts of a marriage settlement, with power to purchase a leasehold house. In 1875 *G.* and wife purchased a leasehold house, which was assigned to *A.*, who agreed to hold it on the trusts of the articles. In 1883 a settlement was executed by which, after reciting that the property consisted of the house, and certain other particulars, *G.* and wife appointed *R.* to be trustee and assigned to him part of the property, and agreed that the rest should be transferred to him. In February, 1884, *A.* assigned the leasehold to *R.*, who did not attain twenty-one till November, 1884. One of the children of the marriage took out in 1885 an originating summons against *A.* and *R.* to have their accounts taken:—

Held, by *Bacon*, V.C., that an account must be directed against *A.* and *R.*, limited as regarded *R.* to moneys and properties received by him since he attained twenty-one.

Held, on appeal, that the proper course was to direct an account in the

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usual form against *A.*, with an inquiry whether all or any and what parts of the trust property had come to the hands of *R.*, and what had been his dealings and transactions in respect of the same, and as to the dates of and circumstances attending such receipts, dealings, and transactions.

AN indenture of settlement, dated the 1st of December, 1883, was made between *Garnes* and wife of the one part, and *W. C. Rolfe* of the other part, reciting to the effect that by articles of agreement, dated the 22nd of June, 1874, made before the marriage of Mr. and Mrs. *Garnes*, it was agreed between them that all the then present property and all the future separate property (if any) of Mrs. *Garnes*, should be vested in a trustee or trustees to be mutually agreed on between them, and that a settlement should be executed by all necessary parties, which should contain all the powers, provisions, declarations, covenants, and conditions usually inserted in a settlement of personal property, including a power to vary securities with the joint consent of the husband and wife or the survivor, and a power to invest a portion of the trust fund not exceeding £500 in the purchase of a freehold or leasehold house to be approved of by the husband and wife, and particularly certain trusts therein mentioned, being the trusts set out in the settlement. It further recited to the effect that the property comprised in the articles was now represented by the property thereinafter mentioned, namely: 1. A leasehold house purchased with the approval of Mr. and Mrs. *Garnes* with part of the trust funds, and vested in *V. A. Applin* on the trusts of the articles. 2. A sum of £100 secured to the husband and wife by a mortgage of leaseholds. 3. A sum of about £131 9*s.* 4*d.* secured to them by a bill of sale of furniture. 4. Certain furniture mentioned in a schedule. 5. Certain furniture mentioned in another schedule. The deed went on to recite that the provisions of the articles had been observed up to that time, but that no formal settlement had been executed, and that Mr. and Mrs. *Garnes* had determined to execute such a settlement, and had requested *Rolfe* to act as trustee, and that it was intended that premises 1stly, 2ndly, and 3rdly thereinbefore described should, as soon as conveniently might be after the execution of the settlement, be assigned and transferred to *Rolfe*. *Garnes* and wife then assigned the furniture mentioned in the two schedules to *Rolfe* upon trust to sell

the same as he should think fit, but during the joint lives of Mr. and Mrs. *Garnes* and the life of the survivor not without their, his, or her consent in writing. The trusts were for the separate use of Mrs. *Garnes* for life for her separate use without power of anticipation, then for Mr. *Garnes* for life, and after the decease of the survivor for the children of the marriage as the husband and wife or the survivor should in manner therein mentioned appoint, and subject to any appointment upon trust for such child or children of the marriage as being a son or sons should attain the age of twenty-one years, or being a daughter or daughters attain that age or marry, and if more than one in equal shares.

The leasehold house above-mentioned was assigned to *Applin* by a deed dated the 23rd of December, 1875; and by a deed dated the 16th of February, 1876, which recited the articles, *Applin* covenanted with *Garnes* and wife to stand possessed of the house on the trusts of the articles. By indenture dated the 18th of February, 1884, *Applin* assigned the house to *Rolfe*.

Rolfe, as it appeared, did not come of age till the 22nd of November, 1884.

In February, 1885, the infant daughter of Mr. and Mrs. *Garnes* by her next friend took out an originating summons against *Applin* and *Rolfe* asking that each of them should furnish and vouch their accounts of the trust declared by the articles and settlement, that the funds in their hands might be paid into Court, and a new trustee or trustees appointed in the place of *Rolfe*.

The Chief Clerk of Vice-Chancellor *Bacon* having declined to make any order against *Applin* on the ground that he was not formally a trustee of the articles, and any further order against *Rolfe* than that he should account for moneys received by him after he came of age, the summons was adjourned into Court.

1885. April 29. Vice-Chancellor *Bacon* made the following order:—

"Order that the following account be taken (that is to say), an account of all moneys invested and property come to the hands of the Defendants as trustees of the said articles and indenture of settlement, or to the hands of either of them, or to the hands of any other person or persons by the order or for the use of the Defendants or either of them, and in taking such account the same is as

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regards the Defendant *W. C. Rolfe* to be limited to any moneys and properties received by him since he attained the age of twenty-one years." Appoint a new trustee in the place of *Rolfe*. Reserve costs.

The Plaintiff appealed from this order so far as it restricted the account as against *Rolfe* to moneys received since he came of age. The appeal was heard on the 24th of November, 1885.

MacClymont, for the Appellant:—

I am not now asking for a declaration that the Defendant *Rolfe* is liable for what he did during infancy, but only for an inquiry as to the property which has come into his hands. When the facts are known, I may be able to prove moral fraud against him, and in that case the Court will hold him liable even for what he did when an infant: *Sculthorpe* v. *Tipper* (1).

C. W. Williams, for the Defendant *Rolfe*:—

There is no precedent for such an inquiry against an infant. The Defendant *Rolfe* was incapable of committing a breach of trust during infancy. Therefore the inquiry directed by the Vice-Chancellor is all that the Plaintiff is entitled to: *Whitmore* v. *Weld* (2); *Hindmarsh* v. *Southgate* (3); *Stott* v. *Meanock* (4).

Nov. 25. LORD HALSBURY, L.C.:—

We are of opinion that the order ought to be varied. We do not decide anything as to the liability of the Defendant *Rolfe*, but we think that an inquiry ought to be directed which will bring out all the circumstances connected with his proceedings as to the estate, and the Court will then be in a position to determine whether he is subject to any and what liability in respect of sums received by him during his infancy. The Lord Justice *Fry* has prepared minutes, which he will read.

LINDLEY, L.J.:—

I also agree to the minutes proposed by Lord Justice *Fry*.

(1) Law Rep. 13 Eq. 232.
(2) 1 Vern. 326.
(3) 3 Russ. 324.
(4) 31 L. J. (Ch.) 746; 10 W. R. 605.

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FRY, L.J.:—

The following are the minutes of the order we propose to make:—

Vary so much of the order of the Vice-Chancellor as directs the accounts, and direct accounts and inquiry as follows:—

1. An account in the usual form of all moneys and property come to the hands of Defendant *Applin* as trustee of the articles.

2. An inquiry whether all or any and what part or parts of the moneys and property mentioned in the indenture of the 1st of December, 1883, as then representing the property comprised in the articles of the 22nd of June, 1874, have or has come to the hands or into the possession or under the disposition or control of Defendant *Rolfe*, and what have been his dealings and transactions in respect of the same, and of what the property subject to the trusts of the said indenture of settlement now consists, and as to the dates of and circumstances attending such receipts, dealing, and transactions, and let Defendant *Applin* be at liberty to attend the inquiry.

We do not intend by this inquiry to decide anything, but only to bring out the facts so that the Court can deal with them. I can conceive circumstances under which *Rolfe* might be made liable for moneys received by him though received before he came of age.

Solicitors for Plaintiff: *Weall & Barker.*
Solicitor for Defendant: *W. C. Rolfe.*

H. C. J.

BICKERTON *v.* WALKER.

C. A.
1885
Nov. 16, 17;
Dec. 1.

[1883 B. 3348.]

Mortgage—Transferee—Estoppel—Indorsed Receipt.

On the 10th of February, 1879, the Plaintiffs mortgaged to *B.* for £250 their equitable interests in a sum of stock, and also certain policies of assurance. By the mortgage deed they acknowledged the receipt of £250, and they also signed a receipt for that sum indorsed on the mortgage deed. On the 11th of March, 1879, *B.* transferred the mortgage to *H.*, who gave full value for it as a mortgage for £250, and had no notice that the Plaintiffs had not received that sum. The Plaintiffs brought their action, alleging that they had only received £91 instead of £250, and asking redemption on payment with interest of what they had actually received. The Court considered that the evidence would have been sufficient to entitle the Plaintiffs to a judgment on that footing as against *B.*:—

But *held*, that as against *H.*, who had no notice that the whole £250 had

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not been advanced, the account must be taken on the footing of its having been advanced; for that, in the absence of any circumstances to cause suspicion, he was entitled to rely on the acknowledgment in the mortgage deed and the indorsed receipt, and had a better equity than the Plaintiffs, who, by leaving the documents in the hands of *B.*, had enabled him to commit a fraud.

ELIZABETH GOULSTON, who died in 1862, bequeathed to trustees a sum of £1000 upon trust to invest it and pay the income to *Elizabeth Bickerton*, the wife of *John Bickerton*, for life, and after her death upon trust for such children of hers as should be living at her decease, and being sons should attain twenty-one, or being daughters should attain that age or marry, and for such issue of any children dying in Mrs. *Bickerton's* lifetime as should be living at Mrs. *Bickerton's* death, such children to take their parent's share. The legacy was invested in £975 New £3 per Cent. Annuities.

In 1879 Mrs. *Bickerton* was a widow with three children, all of whom had attained twenty-one. *Emily Bickerton*, spinster (hereinafter called Miss *Bickerton*), was one of them.

On the 10th of February, 1879, Mrs. and Miss *Bickerton* executed a mortgage deed by which, in consideration of the sum of £250 therein expressed to be paid to them by *Ebenezer Bates*, "the receipt and payment of which said sum of £250 they the said *E. Bickerton* and *E. Bickerton* the younger do hereby acknowledge, and from the same and every part thereof do hereby release the said *E. Bates*, his executors, administrators, and assigns," they jointly and severally covenanted with *Bates* for the payment to him of £250 with interest at £7 per cent. on the 10th of August then next. Mrs. *Bickerton* then assigned to *Bates* her life interest in the £975 stock and a policy of assurance for £100 effected by her on her own life, and Miss *Bickerton* assigned to *Bates* her reversionary share in the £975 stock and a policy of assurance for £300 effected by her on her own life, subject, as regards all the interests assigned, to redemption on payment of £250 with interest at £7 per cent. on the 10th of August then next. Indorsed on the deed was a receipt in the usual form, signed by Mrs. and Miss *Bickerton*, acknowledging the receipt of £250.

Astley acted as solicitor for both parties in this transaction, and the deed was left in his hands. On the 11th of March, 1879, the

mortgage was transferred by *Bates* to *Hunter*, who acted by his own solicitor, *Walker*, and gave full value for the mortgage as a mortgage for £250, without making any inquiry from the mortgagors.

This action was commenced by Mrs. and Miss *Bickerton* against *Walker*, *Bates*, *Astley*, and *Hunter*, alleging that the Plaintiffs had only received sums amounting to £91 17*s.* 6*d.* instead of £250, that *Bates* was the nominee and trustee of and for *Walker*, and that *Bates* and *Astley* acted under his directions, and that *Hunter* had notice of the above facts when he took his transfer. The Plaintiffs asked that the mortgage might be cancelled, they offering to pay the sum really advanced and the interest thereon, and that the transfer might be declared void against the Plaintiffs, or in the alternative that the mortgage might stand as a security for what had been really advanced and interest, and that the Plaintiffs might have redemption on that footing, or as another alternative, that they might have redemption on the mortgage deed as it stood.

It was clearly shewn that *Walker* was not interested in the mortgage, and had simply acted as *Hunter's* solicitor, and no ground was shewn for affecting either of them with notice that the Plaintiffs had not received the whole £250. Vice-Chancellor *Bacon* considered the Plaintiffs' case not to be proved, and gave a judgment dismissing the action with costs as against *Walker*, and dismissing it with costs as against *Hunter*, except so far as it sought the ordinary judgment for redemption. The usual order in a redemption suit was made against *Hunter* with a direction that the account was to be taken on the footing of £250 having been advanced to the Plaintiffs.

The Plaintiffs appealed, and the appeal was heard on the 16th and 17th of November, 1885. The evidence as to the circumstances under which the mortgage was executed was gone into, and in the opinion of the Court of Appeal was such as would, if there had been no transfer, have made it proper to decree redemption on payment only of what should be shewn to have been actually advanced. *Astley* was abroad and *Bates* did not appear, so the material question was whether a decree of that nature could be made against *Hunter*.

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Seward Brice, for the Appellants :—

I contend that a mortgage can only be enforced by a transferee to the same extent as it might be enforced by the original mortgagee: *Parker* v. *Clarke* (1). The transferee takes subject to the equities which affect the original mortgagee: *Norrish* v. *Marshall* (2).

[FRY, L.J. :—That case only deals with subsequent transactions between the mortgagor and mortgagee, the mortgagor not knowing of the transfer.]

The principle is illustrated by *Matthews* v. *Wallwyn* (3), which decides that a transferee takes subject to the account between the mortgagor and mortgagee. The principal thing in the transaction is the assignment of the debt, as said by Lord *Eldon* in that case (4). The debt, until the recent change in the law, was only assignable in equity, the assignment is subject therefore to equitable principles; and passes nothing but what is justly due on the instrument. *Williams* v. *Sorrell* (5) follows the same principle. The true view is that the transferee is bound by all equities affecting the mortgage transaction, not merely by the state of the account. *Smith* v. *Parkes* (6) shews that the assignee of a debt takes subject to all equities.

[BOWEN, L.J. :—Are you not estopped by the deed and the receipt upon it from saying that the whole sum was not advanced? *Goodwin* v. *Robarts* (7).]

That was the case of a document which by custom is a negotiable instrument. The present is the case of a mortgage which is not given with a view of its passing from hand to hand.

[BOWEN, L.J., referred to *In re Agra and Masterman's Bank* (8).]

The present case is more like *In re Natal Investment Company* (9), in which the *Agra Bank Case* was referred to, and which is a strong authority in my favour. There is no estoppel from a recital in a security unless it is shewn that the recital is intended

(1) 30 Beav. 54.
(2) 5 Madd. 475.
(3) 4 Ves. 118.
(4) Ibid. 128.
(5) 4 Ves. 389.
(6) 16 Beav. 115.
(7) 1 App. Cas. 476.
(8) Law Rep. 2 Ch. 391.
(9) Law Rep. 3 Ch. 355.

to be shewn to third parties to induce them to act upon it; and the fact that no prudent person takes a transfer of a mortgage without an inquiry from the mortgagor, shews that the recital is not intended to be acted on. *Rolt* v. *White* (1) and *Athenæum Life Assurance Society* v. *Pooley* (2) support my contention. I say then that the mortgage ought to be cut down as against *Hunter*. No prudent transferee of a mortgage ever takes his transfer without inquiring from the mortgagor, and it is negligence to do so. The case is quite different from that of an absolute sale, because there an inquiry would not be made of the original vendor unless there was something to raise suspicion.

Millar, Q.C., and *Laing*, for *Walker* and *Hunter*:—

As against *Walker* there is no case: he ought never to have been made a party, and the dismissal as against him must stand. As regards *Hunter*, assuming that the whole £250 was not advanced, we say that he is not affected by that. If a person takes a transfer of a mortgage without inquiring from the mortgagor, he does so at his own risk as regards the state of the account, but the mortgagor is estopped from saying that any statement made by himself is untrue. The transferee has a right to act on any such statement. Everybody knows that the sum due on a mortgage may have been reduced by part payment, and if a transferee makes no inquiry from the mortgagor the mortgagor gets the benefit of previous part payments as against him. By saying that a less sum than the original principal is now due he is not contradicting anything in the mortgage deed, but here the mortgagor is alleging as against a *bonâ fide* purchaser without notice that the statement in the mortgage deed as to the sum advanced is not true. That cannot be allowed: *Hunter* v. *Walters* (3); *West* v. *Jones* (4); *Rice* v. *Rice* (5). In *Shropshire Union Railways and Canal Company* v. *The Queen* (6), Lord *Cairns* refers to *Rice* v. *Rice* with approbation. The principle is not confined to cases where *A.* makes a written representation to *B.* with the intention that it shall be shewn to *C.*, for both Lord *Cairns*

(1) 31 Beav. 520.
(2) 3 De G. & J. 294.
(3) Law Rep. 7 Ch. 75.
(4) 1 Sim. (N.S.) 205.
(5) 2 Drew. 73.
(6) Law Rep. 7 H. L. 496, 509.

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in the last-mentioned case, and Lord *Hatherley* in *Hunter* v. *Walters* (1), lay it down broadly that a receipt for money estops the party giving it, as between him and a third person who has acted on the faith of it.

[FRY, L.J.:—An assignment of a *chose in action* is subject to all equities. Do you say that the receipt is an assertion that there are no such equities?]

I say that at all events it makes the equities unequal; a person who has given a receipt stating that he has received money, and then disputes its truth, cannot have as good an equity as a person who acted on the faith of the receipt.

[BOWEN, L.J.:—What do you say to *In re Natal Investment Company* (2)?]

In that case there was no receipt, and no one buying a debenture in the market buys it on the faith of the whole of the money having been advanced, it being notorious that debentures are often issued below par. In none of the cases cited against us was there any indorsed receipt. *White* v. *Wakefield* (3) is strong in our favour.

S. Brice, in reply.

1885. Dec. 1. The judgment of the Court (Sir *James Hannen*, and *Bowen* and *Fry*, L.JJ.) was delivered by

FRY, L.J.:—

In the year 1879 a sum of £975 New 3 per Cent. Annuities was standing in the name of a trustee under the will of a Mrs. *Goulston*, upon trust for the Plaintiff, Mrs. *Bickerton*, for life, with remainder in equal shares to her children living at her death and the issue of children then deceased. She had three children, of whom the Plaintiff, Miss *Bickerton*, is one.

By an indenture bearing date the 10th of February, 1879, the Plaintiffs assigned to the Defendant *Bates* their interests in these annuities to secure a sum of £250 and interest at 7 per cent. payable on the 10th of August, 1879. On this mortgage there

(1) Law Rep. 7 Ch. 75. (2) Law Rep. 3 Ch. 355.
(3) 7 Sim. 401.

was indorsed the usual receipt for the sum of £250, which was signed by both Plaintiffs.

The Plaintiffs allege that sums amounting to £91 17*s.* 6*d.*, and no more, were paid to them in respect of the £250; and though the evidence adduced by the Plaintiffs is far from satisfactory, we are of opinion that as against the Defendant *Bates* the Plaintiffs have established by evidence a case for reducing the mortgage, or, in other words, that as against *Bates* the Plaintiffs would be entitled to a declaration of their right to redeem on payment of what should be found to have been actually advanced on the mortgage, with interest.

On the 11th of March, 1879, the Defendant *Bates* assigned this mortgage security to the Defendant *Hunter*, and it is not disputed by the Plaintiffs but that this Defendant has shewn that he paid the full consideration of £250 for the assignment, and that he took the assignment without actual notice of any equity subsisting between the Plaintiffs and *Bates* except the equity of redemption according to the form of the mortgage deed.

The Plaintiffs, however, contend that inasmuch as the assignment of their interests in the legacy was the assignment of a *chose in action*, the Defendant *Hunter* is now liable to all the equities which the Plaintiffs had at the date of the assignment against his assignor, *Bates*. This the Defendant *Hunter* denies.

As the legal interest in the legacy was and is vested in the trustee of Mrs. *Goulston's* will, it is evident that the interests both of the Plaintiffs and of the Defendant *Hunter* are equitable interests only, and the real question for our decision is, what are the relative merits of these persons having adverse equitable interests? If the merits of the one are greater than those of the other, the Court will give the priority to the greater merits; if and only if the merits are equal, it will give the priority of right to the one who is prior in point of time.

The Plaintiffs executed a deed which recited that they had received the whole sum of £250, and which stipulated that their right of redemption should be on payment of the sum of £250 and interest, they signed a receipt on the back of the deed stating that they had in fact received this sum of £250, and they permitted *Bates*, or *Astley* who was acting with or for him, to

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have possession of the deed containing these false statements. That the Plaintiffs were in a moral point of view excusable for these acts is beyond doubt, and that they were deceived by those whom they trusted, and as such are objects of sympathy, is equally clear. But they were inexact and careless, and placed in the hands of *Bates* or *Astley* the means of deceiving other persons, and these are in the view of a Court of Equity demerits.

Was *Hunter* guilty of negligence or want of care in his part of the transaction? He must, on the evidence before us, be taken to have advanced his money on the faith of the production of the mortgage deed and receipt signed by the Plaintiffs; and if the assignment by the Plaintiffs had been, not a mortgage but an absolute conveyance, it would, we think, have been clear that there would have been no negligence whatever on the part of the Defendant *Hunter* in not inquiring of the Plaintiffs as to their rights or claims. But it has been argued before us that there is a wide difference in this respect between a mortgage and an absolute conveyance, because it is said, and said truly, that in the ordinary course of business a prudent assignee of a mortgage, before paying his money, requires either the concurrence of the mortgagor in the assignment, or some information from him as to the state of accounts between mortgagor and mortgagee. The reason of this course of conduct is however, in our opinion, to be found in the fact that an assignee of a mortgage is affected by all transactions which may have taken place between mortgagor and mortgagee subsequently to the mortgage, and the assignee is bound to give credit for all moneys received by his assignor before he has given notice of the assignment to the mortgagor. But in the present case the assignment was made very soon after the execution of the mortgage, and before the time for payment had arrived; so that, whilst it was possible, it was not probable, that any payment would have been made either of principal or interest; and we are of opinion that if an assign is willing to take the risk of any payment having been made after the date of the mortgage he is not guilty of carelessness or negligence if, in the absence of any circumstances to arouse suspicion, he relies upon the solemn assurance under the hand and seal of the mortgagor as to the real bargain carried into effect by the mortgage

deed, upon the possession of that deed by the mortgagee, and upon the receipt for the full amount of the mortgage money under the hand of the mortgagor.

The presence of a receipt indorsed upon a deed for the full amount of the consideration money has always been considered a highly important circumstance. The importance attached to this circumstance seems at first sight a little remarkable when it is remembered that the deed almost always contains a receipt, and often a release, under the hand and seal of the parties entitled to the money. But there are circumstances which seem to justify the view which has prevailed as to its importance. A deed may be delivered as an escrow, but there is no reason for giving a receipt till the money is actually received, unless it be to enable the person taking the receipt to produce faith by it. A deed is not always, perhaps rarely, understood by the parties to it, but a receipt is an instrument level with the ordinary intelligence of men and women who transact business in this country, and which he who runs may read and understand.

Our decision follows, as will be obvious to those who are familiar with this branch of law, the general lines laid down by *Kindersley*, V.C., in *Rice* v. *Rice* (1). For the solution of the particular question which distinguishes this case from that, viz. whether there is for this purpose any difference between a mortgage and an absolute conveyance, we have not been aided by any authority cited to us at the bar.

For the reasons already given we dismiss this appeal with costs.

Solicitor for Plaintiffs: *G. Twynam.*

Solicitors for *Hunter & Walker: Walker & Mewburn-Walker.*

(1) 2 Drew. 73.

H. C. J.

C. A.
1885
Dec. 8.

In re SUMMERVILLE.

Practice — Lunacy Regulation Act—Petition for Application of Property of alleged Lunatic—Notice signed by Agent of Solicitor—Lunacy Orders, 1883, *r.* 59.

The notice of a petition under the *Lunacy Regulation Act*, 1862, *ss.* 12, 13, 14, 15, which was served on an alleged lunatic, was signed by the *London* agent of the Petitioner's solicitor, expressly as agent:—

Held, that this was not a compliance within the 59th rule of the Lunacy Order, 1883, which directs the notice to be signed by the Petitioner or his solicitor.

IN this case a petition was presented by the brother of a person of unsound mind not so found, under sects. 12, 13, 14, and 15 of the *Lunacy Regulation Act*, 1862, for the application of her property. By the 59th rule of the Lunacy Orders, 1883, it was ordered that "the notice to the alleged lunatic of the application for an order in pursuance of the said sections, shall be by service on him personally of a copy of the petition, with a notice thereon indorsed, signed by the Petitioner or his solicitor in the Form VIII. in the schedule hereto, with such variations as the case may require."

In the present case the alleged lunatic was confined in the *Kent* Lunatic Asylum. The Petitioner lived at *Liverpool*, and his solicitor at *Bruton*, in *Somersetshire*. The original petition was signed by the Petitioner in *London* in the presence of the *London* agent of the solicitor, and when it had been filed the copy for service was indorsed with a notice signed by the *London* agent, expressly as agent for the country solicitor; the Petitioner having in the meantime left *London*. The Registrar in Lunacy having objected to the notice of service, the point was mentioned to the Court.

Rawlins, for the Petitioner.

LINDLEY, L.J.:—

The notice was signed in this case by the *London* agent as agent for the country solicitor; that was not within the rule and not in the usual form. If he had been authorized to sign, and

had signed, as the solicitor of the Petitioner, that would have been sufficient. But we think this signature is not sufficient.

C. A. 1885 *In re* SUMMERVILLE.

FRY and LOPES, L.JJ., concurred.

Solicitors: *Bolton, Robbins, Busk, & Co.*, agents for *W. Bennett, Bruton.*

M. W.

In re NEVILL, A LUNATIC.

C. A. 1885 Dec. 14.

Power—Lunatic—Consent to exercise of Power—Lunacy Regulation Act, 1853 (16 & 17 *Vict. c.* 70), *ss.* 136, 137 [*Revised Ed. Statutes vol. xi., p.* 690.]

A marriage settlement contained a power of advancement exercisable by the trustees after the death of the husband and wife, or at any time previously if they or the survivor of them should direct. The husband was found lunatic:—

Held, that under the *Lunacy Regulation Act*, 1853, s. 137, the Court had jurisdiction to authorize the committee to consent on behalf of the lunatic to the exercise of the power.

BY a settlement dated the 30th of June, 1855, made on the marriage of Mr. and Mrs. *Nevill*, funds belonging to the husband and wife were settled, as to the husband's fortune upon trust to pay to the wife, during the joint lives of the husband and wife, a yearly sum of £100 as pin money for her separate use without power of anticipation, and subject thereto to pay the income to the husband during his life, and after his death to the wife for her life; and as to the wife's fortune, upon trust to pay the income to her for life for her separate use without power of anticipation, and after her decease to pay it to the husband for life. After the decease of the survivor of the husband and wife, both funds were to be held in trust for such children or remoter issue of the marriage as the husband and wife should by deed, or the survivor of them should by deed or will, appoint, and in default of appointment upon trust for such child or children as being a son or sons should attain twenty-one, or being a daughter or daughters, should attain that age or marry. The settlement contained a power for the trustees or trustee "at any times or time after the decease of both of them the said [husband and wife], or

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at any time previously, in case they or the only survivor of them shall direct by any writing or writings signed by them, him, or her," to levy and raise any part or parts not exceeding in the whole one equal fourth part of the then expectant or presumptive or then vested portion under the trusts thereinbefore declared of each and every or any child of the said intended marriage of or in all or any part of the said trust moneys, stocks, funds, and securities, and to apply the same in such manner as the said trustees or trustee shall, in their or his discretion, think fit, for the preferment, advancement or benefit of such child, or in defraying either wholly or partially the costs and expenses of educating or training him or her at any time after the age of sixteen years, in order to qualify him or her for any particular profession, or pursuit, or employment, or if the child should be adult, to advance and pay the same to him or her for his or her accommodation."

There was issue of the marriage one child only, a son, born in November, 1857. In 1867 the husband was found lunatic. The income from his settled fortune was about £1000 a year. At the time of the present application, £400 a year was allowed for the maintenance of the lunatic, and £485 was allowed to the wife for the maintenance of herself and her son.

In 1877 the son married, and by a settlement made with the sanction of the Court, his interest under his parents' settlement was assigned to trustees, upon trust to raise £4000 when the funds came into possession, and hold it on such trusts as the son should by deed appoint, and in default of appointment on the trusts therein mentioned. The son, after coming of age, appointed this sum to himself, and incumbered it. He being in embarrassed circumstances, the family thought it desirable that the £4000 should be advanced to him under the power of advancement in the settlement of 1855, which would enable him to pay all his debts. The committee of the estate and the wife and son accordingly took out a summons asking that leave might be given to the committee to give his consent, in the name and on the behalf of the lunatic, to the exercise by the trustees of the power of advancement. The summons was adjourned into Court, a difficulty having been felt as to whether there was jurisdiction to make an order.

Ingle Joyce, for the application:—

If this be looked upon as a power in the trustees to the exercise of which the consent of the husband and wife is necessary, their power of consent may be considered as in the nature of a beneficial interest, their consents being required in order that their life interests may not be interfered with against their will. If that be so, then as regards the lunatic the case comes within the terms of sect. 136 of the *Lunacy Regulation Act*, 1853. If it be looked upon as a case where the husband and wife are the persons to exercise the power, or where the power to consent is not in the nature of a beneficial interest, the power or power of consent must be looked upon as vested in them in the character of trustees, being a power to be exercised for the benefit of other persons, and the case is within sect. 137. It is evident, taking the two sections together, that they are intended to include all cases in which a power is exercisable by a lunatic, or with his consent.

THE COURT (*Lindley*, *Fry*, and *Lopes*, L.JJ.), without giving any formal judgment, stated their opinion to be that they had jurisdiction under sect. 137, and adjourned the case for consideration on the merits.

Solicitors: *Norris & Norris.*

H. C. J.

C. A. 1885 Dec. 15.

In re GARROD, a Lunatic.

Lunacy—Appointment of New Trustees—Consent to Appointment of New Trustees—Lunacy Regulation Act, 1853 (16 & 17 *Vict. c.* 70), *s.* 137 [*Revised Ed. Statutes, vol. xi., p.* 690.]

A will contained a power of appointment of new trustees exercisable with the consent of the tenant for life. The trustees having died, the tenant for life, who had been found lunatic, presented a petition in Lunacy and Chancery by the committee of her estate as next friend for the appointment of new trustees :—

Held, that there was no jurisdiction in lunacy to appoint new trustees, and that the only proper application in lunacy was to ask for an order authorizing the committee to consent on behalf of the lunatic to an appointment of trustees under the power.

CHARLES BERE, by will dated the 13th of August, 1845, bequeathed his personal estate upon trusts under which, in the events which had happened, his daughter Mrs. *Garrod* was entitled to the income for life, and after her death the capital was to be in trust for her children, and in default of issue was given to such persons as she should by will appoint, and in default of appointment to nephews and nieces of the testator. The will contained a power which (*inter alia*) authorized the personal representatives of the last deceased trustee, with the consent of the testator's son and daughter, or the survivor of them, during his or her life to appoint new trustees.

Mrs. *Garrod* was found of unsound mind by inquisition in 1878. The trustees having all died, Mrs. *Garrod*, by the committee of her estate as next friend, presented a petition in lunacy and in the Chancery Division for the appointment of three specified persons to be new trustees in the place of the deceased trustees. The petition was served on the representative of the surviving trustee. The testator's son was dead.

Bush, Q.C., for the Petitioner, referred to *In re Tate* (1), and the *Trustee Act*, 1852 (15 & 16 Vict. c. 55), s. 9.

F. G. Bagshawe, for the Respondent.

(1) 20 Ch. D. 135.

LINDLEY, L.J.:—

If the petition had asked us to authorize the committee on behalf of the lunatic to consent to the exercise of the power of appointing new trustees, we are of opinion that the case would have been within the *Lunacy Regulation Act*, 1853 (16 & 17 Vict. c. 70), s. 137, the consent of the lunatic being necessary "as a check upon the undue exercise of the power." We, therefore, have jurisdiction to authorize the committee to give the consent. It would not, however, have been necessary to present a petition to obtain an order for that purpose. The petition does not ask that, but asks that new trustees may be appointed. We think that we have no jurisdiction to do this. The Chancery Division might appoint new trustees, but there is no case here of a lunatic trustee, and the mere fact that a person whose consent is requisite to the appointment of new trustees under a power is a lunatic, does not justify an application in lunacy to appoint them. The petition, therefore, is misconceived. We will not, however, put the parties to the expense of beginning again *de novo*, but, although the petition is irregular, we will make an order giving the committee leave to consent to the appointment of the new trustees under the power. The committee, however, must be allowed out of the estate no further costs than he would have incurred had he applied by summons for authority to consent to the exercise of the power.

FRY and LOPES, L.JJ., concurred.

Solicitor for Petitioner: *Tempany.*
Solicitors for Respondent: *Palmer, Eland, & Nettleship.*

H. C. J.

C. A.
1885
KAY, J.
Dec. 5.
C. A.
Dec. 16.

In re PATENT INVERT SUGAR COMPANY.

Company—Reduction of Capital—Resolutions passed at the same Meeting to alter the Articles and reduce the Capital—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 50 [*Revised Ed. Statutes, vol. xiv., p.* 214]—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 9 [*Revised Ed. Statutes, vol. xv., p.* 624].

A company, the regulations of which did not authorize a reduction of capital, passed on the 30th of October—(1) A resolution inserting in the articles a power to reduce its capital, and (2) a resolution for reducing the capital. Both these resolutions were confirmed at a meeting on the 16th of November :—

Held, by *Kay*, J., and by the Court of Appeal, that the Court could not confirm the resolution for the reduction of capital, for that a special resolution for that purpose could not be passed until after the regulations of the company had been altered so as to make them authorize a reduction of capital.

THE company was registered in 1883 as a company limited by shares. The nominal capital was £80,000 in 8000 shares of £10 each. The shares were fully paid up. The memorandum and articles contained no power to reduce the capital.

In December, 1884, the company by reason of a fire sustained a loss of £8000, after which its capital to that extent was not represented by available assets.

On the 30th of October, 1885, an extraordinary general meeting was held at which, *inter alia*, the following resolutions were passed :—

"1. That the articles of association be altered in the manner following :—(*a*) That the following article shall be inserted after article 3, and shall be called article 3*a* :—The company may from time to time reduce its capital, and may consolidate and subdivide its shares" [the other alterations need not be noticed]. "2. That the capital of the company be reduced from £80,000 to £72,000, and that such reduction be effected by cancelling capital which has been lost or is unrepresented by available assets, to the extent of £1 per share upon each of the 8000 shares in the company, and that reduced capital be divided into 72,000 shares of £1 each credited in the books of the company as fully paid up."

The above resolutions were confirmed at a further extraordinary general meeting held on the 16th of November, 1885. The company then presented a petition for confirmation of resolution No. 2, and the petition came on before *Kay*, J., on the 5th of December, 1885.

Seward Brice, for the Petitioner, referred to the *Companies Act*, 1867 (30 & 31 Vict. c. 131), s. 9, which enacted that "any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorized so to do by its regulations as originally framed, or as altered by special resolution, as to reduce its capital: but no such resolution for reducing the capital of any company shall come into operation until an order of the Court is registered by the Registrar of Joint Stock Companies, as is hereinafter mentioned," and submitted that the special resolutions for altering the articles and for a reduction of the capital being separate, though they were passed at the same extraordinary general meeting, were a compliance with the terms of the section, they having been confirmed by a special resolution at a subsequent general meeting.

The case of *In re West India and Pacific Steamship Company* (1) was referred to.

KAY, J., was of opinion that the special resolution for the reduction of capital must be subsequent to the resolution altering the regulations, and accordingly directed that the petition should stand over in order that a special resolution to reduce the capital might be passed, and gave liberty to amend the petition, and to bring it on again after such special resolution should have been passed.

The company appealed, and the appeal came on before *Lindley* and *Fry*, L.JJ., on the 16th of December, 1885.

Seward Brice, for the appeal, referred to the *Companies Act*, 1862 (25 & 26 Vict. c. 89), s. 50; the *Companies Act*, 1867 (30 & 31 Vict. c. 131), s. 9; *In re West India and Pacific Steamship Company*; and *Taylor* v. *Pilsen Joel and General Electric Light Company* (2),

(1) Law Rep. 9 Ch. 11, n. (2) 27 Ch. D. 268.

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and contended that the steps which had been taken were a sufficient compliance with the requisitions of the latter Act.

LINDLEY, L.J.:—

A company may pass a special resolution to reduce its capital if authorized to do so by its regulations as originally framed, or as altered by special resolution. At the time when the meeting of October was held the company was not so authorized, and the meeting had no power to entertain the proposal for reducing the capital. I am of opinion that Mr. Justice *Kay* was right.

FRY, L.J., concurred.

Solicitors: *Snell, Son, & Greenip.*

H. C. J.

C. A. 1885 Nov. 12.

In re YOUNG AND HARSTON'S CONTRACT.

[1885 Y. 242.]

Vendor and Purchaser—Interest on Purchase-money—Wilful Default—Vendor and Purchaser Act, 1874—*Jurisdiction.*

Conditions of sale provided that the purchase was to be completed by the 8th of September, and that "if from any cause whatever other than wilful default on the part of the vendor" completion of the purchase was delayed beyond that day the purchase-money was to bear interest from that day to the day of actual payment. The property was in mortgage, and the draft conveyance was not returned approved by the mortgagees to the purchasers until the 6th of September. On the 8th of September the engrossment was sent to the vendor's solicitors, but the vendor had gone abroad for his autumn holiday on the 6th of September, and the engrossment executed by him was not returned until the 18th of September. The mortgagees were also out of town, and the vendor's solicitors declined to incur the expense of a special messenger to procure execution by them. The purchase was not completed until the 14th of October:—

Held, on summons by the purchasers under the *Vendor and Purchaser Act*, 1874, s. 9, for recovery of interest on the purchase-money paid by them under protest, that by his going abroad two days before the time known by him to have been fixed for completion of the purchase, there had been so far "wilful default on the part of the vendor" within the exception contained in the conditions of sale, that the purchasers were

entitled to recover out of the interest paid by them a sum proportionate to the delay.

Quære, whether the Court has jurisdiction upon summons under sect. 9 of the *Vendor and Purchaser Act*, 1874, to order interest which has been erroneously paid by a purchaser to be repaid to him.

IN July, 1884, Messrs. *Harston, Brown, & Dolman* agreed to purchase from *J. Young*, who sold as trustee in liquidation of *S. G. Hepburn*, an estate in *Kent*, called *The Baldwyns*, for £41,000, and paid a deposit of £3000: it being provided by the contract, dated the 10th of July, that the sale should be on the printed conditions (on which it had been attempted to sell by auction) so far as they were applicable to a sale by private contract.

By the conditions of sale it was provided that the purchaser was to pay the remainder of the purchase-money on the 8th of September, 1884, when the purchase was to be completed—"and if from any cause whatever other than wilful default on the part of the vendor the completion of any purchase [the property was put up for sale in lots] is delayed beyond the before-mentioned day, the remainder of the purchase-money, and the amount of valuation, is to bear interest at the rate of 5 per cent. per annum from that day to the day of actual payment thereof;" objections and requisitions to be sent in within fourteen days from delivery of the abstract; the conveyance to be prepared by the purchaser, and the engrossment to be delivered at the office of the vendor's solicitors before the 20th of August for execution by the vendor and other necessary parties.

The abstract of title was not delivered until the 25th of July, and the purchasers' requisitions were delivered on the 6th of August. The vendor's replies were sent on the 12th of August, and the purchasers' observations on the replies on the 15th of August. On the 19th of August the draft conveyance was sent to the vendor's solicitors. On the 26th of August the purchasers' solicitors wrote asking to have the draft approved and returned, stating that their clients' money would be ready on the 8th of September, and that they should object to pay interest if the purchase was not settled on that day. The vendor's solicitors replied that the draft conveyance was with the solicitors of the first

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mortgagees, and would go from them to the solicitors of the second mortgagees; and that the terms of the contract with regard to interest must be observed. On the 3rd of September the purchasers' solicitors again wrote asking the cause of the delay, and repeating their objection to pay interest. On the 6th of September the vendor's solicitors forwarded the draft conveyance with a letter stating that if they could have the engrossment during the next Monday (the 8th of September) they thought they could get the vendor to execute it on that day, before his departure. This letter was received by the purchasers' solicitors on Monday the 8th of September, and in the afternoon of the same day they sent the engrossment, but were informed that *Young*, the vendor, had left *London* for *Switzerland* on Saturday (the 6th) without leaving his address, which was being asked for in order that the deed might be sent out to him for his execution. On the 18th of September the engrossment, executed by *Young*, was returned from *Switzerland*. Some further delay occurred in procuring the execution by the mortgagees, two of whom were out of town, one at *Whitby* and the other at *Dover*, and were not expected to return until the 3rd of October. On the 27th of September the purchasers' solicitors wrote suggesting that the vendor's solicitors should send a clerk to *Whitby* and *Dover* to obtain at once the execution by the two mortgagees, adding that they hoped that interest would not be required "as the purchase-money was ready to be paid on the 8th of September, and particularly as the estate was in hand and no income was recoverable from it." The vendor's solicitors declined to send a special messenger to *Whitby* and *Dover* except at the purchasers' expense. The purchase was ultimately completed on the 14th of October, when the balance of the purchase-money was paid with (under protest and without prejudice to contemplated proceedings) interest to the amount of about £180, which the vendor's solicitors again declined to waive.

A summons was then taken out by the purchasers under the *Vendor and Purchaser Act*, 1874, asking that the vendor might be ordered to return to them the interest they had so paid.

On the 13th of March, 1885, Vice-Chancellor *Bacon* dismissed the summons with costs, on the ground that there was no jurisdiction to order interest, which might have been erroneously paid,

to be repaid upon an application under the *Vendor and Purchaser Act* (1).

The purchasers appealed from this decision.

Grosvenor Woods, in support of the appeal:—

This being "a question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract)," the Court has jurisdiction under sect. 9 of the *Vendor and Purchaser Act*, 1874, to decide it upon summons.

[SIR J. HANNEN asked if the vendor insisted upon the objection to the jurisdiction.

Marten, Q.C., on behalf of the vendor, waived this objection.]

Upon the merits the vendor is not entitled to interest, as, by leaving *England* on the 6th of September, he rendered completion on the 8th impossible, and has been guilty of wilful default within the meaning of the conditions of sale. The Court will not allow him to profit by his own wrong by compelling the purchasers to pay for the delay which he has himself occasioned, and in such a case effect will not be given to the general rule that a purchaser must pay interest from the time fixed for completion: *Esdaile* v. *Stephenson* (2); *Jones* v. *Mudd* (3); *De Visme* v. *De Visme* (4).

[FRY, L.J., referred to *Dart's* Vendors and Purchasers (5).]

Sherwin v. *Shakspear* (6) and *Williams* v. *Glenton* (7), in which doubt seems to have been thrown on *De Visme* v. *De Visme*, establish that delay arising from difficulties in making out the title will not exempt the purchaser from payment of interest under such a condition, but also clearly recognise that there may be such an amount of delay or misconduct on the part of the vendor as will excuse the purchaser. Neglect or default may be wilful though it may have been unintentional and have arisen from forgetfulness, if it be spontaneous, and did not at all arise from the pressure of external circumstances over which the person could have no control: *Elliott* v. *Turner* (8). In this case the

(1) 29 Ch. D. 691.
(2) 1 S. & S. 122.
(3) 4 Russ. 118.
(4) 1 Mac. & G. 336.
(5) 5th Ed. p. 640.
(6) 5 D. M. & G. 517.
(7) Law Rep. 1 Ch. 200.
(8) 13 Sim. 477.

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delay was not due to the state of the title, but arose from the voluntary act of the vendor. Then, as the concurrence of the mortgagees was essential to the purchase, the vendor should have procured execution by them without delay and at his own expense, and cannot excuse himself on the ground that they were out of town at the time: *Wells* v. *Maxwell* (1).

Marten, Q.C., and *Northmore Lawrence*, for the vendor:—

The purchasers have not made out any case for being relieved from payment of interest from the day fixed for completion. No wilful default or intentional omission can be attributed to the vendor, who was justified in assuming that the purchase could not be at once completed when the draft conveyance was not returned from the mortgagees until the 4th of September. Moreover, the purchasers had themselves failed to comply with the condition that the engrossment should be left at the vendor's solicitors before the 20th of August for execution by the vendor and other necessary parties. Any delay in completing the purchase by obtaining execution of the conveyance by the mortgagees, over whom the vendor had no control, was caused by their absence, and this was a difficulty in making out the title, which has never been held to be that wilful delay or fraud on the part of a vendor which will alone exempt a purchaser on such a condition from payment of interest: *Williams* v. *Glenton* (2); *Vickers* v. *Hand* (3); *Sugden's* Vendor and Purchaser (4). At all events the purchasers, in order to be relieved from payment of interest, must have given notice to the vendor that their money was "lying dead": *Dyson* v. *Hornby* (5).

Grosvenor Woods, in reply.

SIR J. HANNEN:—

The question in this case is whether or not the delay which has occurred in the completion of this purchase arose from wilful default on the part of the vendor.

Now a great many cases have been cited, but after all it is a

(1) 32 Beav. 550.
(2) Law Rep. 1 Ch. 200.
(3) 26 Beav. 630.
(4) 14th Ed. p. 628.
(5) 4 De G. & Sm. 481.

question of fact which must depend upon the circumstances of each case. The cardinal point in the case appears to be this, whether where a person has entered into a contract to be completed upon a particular day—in this case the 8th of September—and he, knowing that, goes away upon the 6th to take his autumn holiday, he has been guilty of wilful default thereby causing the non-completion of the contract. It seems to me a very plain case, and I really can entertain no doubt whatever as to what any jury would have thought, and we, in the position of the jury, come to the conclusion that he made default in not being in the position to complete the contract so far as it lay with him upon the 8th of September; and that was a default of an intentional character on his part, and therefore wilful.

It has been said, indeed, that that reason does not apply, because there had been a delay in the forwarding of the engrossment by the 20th of August under the conditions of sale. But it has not been suggested and nothing has been shewn from which we can infer, that there was any blame upon anybody in respect of that, and we are not now considering whether there has been a default for which damages could be recovered against anybody by reason of that engrossment of the conveyance not having been supplied by that day, but we are dealing with a state of facts in which it is established that this contract might have been completed, so far as Mr. *Young* was concerned, upon the 8th, if he had not gone away to *Switzerland.*

Our judgment, therefore, is that where a man knowing that some act has to be done by him on the particular day, goes away in disregard of that obligation, he is guilty of default; and doing it intentionally, it is wilful within the terms of a contract of this kind.

But then there undoubtedly still arises the question, what delay was occasioned by his so going abroad? In the first place the actual time that it took for the conveyance to be sent to him, and to be received back, must obviously be taken into account, and that was ten days. But then it is said, even if he had been here on the 8th of September his signing the conveyance would not have been the end of it, because there were still the signatures of the mortgagees to be obtained. But it appears to us—I

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am not so conversant as I wish I were with subjects of this kind, but I collect upon the argument that has been addressed to us, and I believe it is the opinion of my learned brethren—that it was the duty in this case of the vendor to obtain the execution by the mortgagees, and that it does not come within the condition of sale which has been referred to. If, then, it was his duty to obtain these signatures, then undoubtedly a question arises as to what difficulties there would have been at that season of the year in finding the mortgagees, and I do not think it can be imputed to Mr. *Young* as a wilful default that they could not be found exactly at the moment when the conveyance was brought back. But we have to deal with this as a jury, and we are not bound, and I do not know that it is possible, to arrive at any very exact definition of the time which has been lost by reason of Mr. *Young* going abroad, and so delaying the time when application could be made to the mortgagees. But we think that we are allowing ample time if we say that the execution by the mortgagees with due diligence might have been obtained in another fortnight; and we therefore come to the conclusion that with the exception of a fortnight the delay must be considered as arising from the wilful default of Mr. *Young*, and that therefore the interest must be returned to that extent.

BOWEN, L.J.:—

I am of the same opinion. The question in the case is what delay, if any, has been caused by wilful default on the part of the vendor within the meaning of the condition. What does wilful default mean in a contract like this? The term "wilful default"—though one in common use in such contracts—is not a term of art, and to pursue authorities with a view to defining for all time what is its meaning in a contract like this appears to me to press citation far beyond the point at which it ceases to be useful. Default is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction. The other word which it is sought to define is "wilful." That is a word of

familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent. Now, if that is all you can get out of the analysis of these words, it becomes plain that to endeavour to classify every conceivable contingency with a view of defining what will be and what will not be wilful default, would be idle. You cannot define the words "wilful default" more than I have defined them. And I only use the definition for the purpose of shewing that the term is a simple one and not technical at all. The next question is whether there has been wilful default here, and with regard to that I entirely agree with the view which has been taken by the President. Can it be said that the vendor knew that the conveyance would not be ready for execution by the 8th of September? He ought to have waited to see, but instead of that he goes away from *England* and is absent on the 8th, which was the day fixed for completion. That being so, we have to consider as a jury how much time was lost by his absence on that day. I think a fortnight is sufficient to allow for the execution by the mortgagees; and with the exception of that fortnight, I draw an inference of fact that the delay arose from Mr. *Young's* wilful default in being absent from *England* at the time fixed for the execution. And therefore, with the exception of this fortnight, he must return the interest for the period of delay for which he is responsible.

FRY, L.J.:—

I entertain the same view, and I think that by this contract of sale Mr. *Young* undertook as part of his duties as a vendor to execute on or before the 8th of September the conveyance to the purchaser.

On the 8th of September the conveyance had been settled not only as between the vendor and the purchaser, but as between them and the mortgagees, and the document had been engrossed

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and was in the hands of his solicitors. Nothing whatever remained for Mr. *Young* to do, but to put his hand and seal to that document.

Now, the reason why he did not do so on the 8th of September was because he had gone away to *Switzerland*. That appears to me to be a default in the performance of his duty. I think that it was a spontaneous act of default on his part, and consequently that the act was wilful. Then it is said that the conditions of sale required that an engrossment should be delivered on the 20th of August, and that in consequence he was to be allowed eighteen days or more for the execution of the conveyance before the 8th of September, and that as it was not delivered till the 8th of September, Mr. *Young* was set free from the obligation to execute on that day.

In my judgment that argument must be unsuccessful, and for this reason, that the contract contained no stipulation as to the time within which the abstract was to be delivered. It did contain stipulations as to the time for sending objections and requisitions. Those stipulations were observed, and there was no unreasonable delay on the part of the purchasers as to anything which led up to the delay of the engrossment. Consequently, I think, nothing relieved Mr. *Young* from the obligation to execute on the 8th of September.

Further than that, in my judgment there was wilful default on the part of the vendor in not obtaining the execution of the conveyance by the mortgagees. He declined to send a messenger at his expense to the places where some of the mortgagees were residing, and said he would only do it at the expense of the purchaser. That, I think, was an unreasonable and an improper course to pursue. Plainly the vendor's solicitors understood that it was their duty to obtain the execution by the mortgagees; they undertook that duty, and it appears to me that they were guilty of wilful default in the performance of it. I think, therefore, in these two particulars there has been wilful default on the part of the vendor. Taking into consideration, on the one hand, what the course of events would have been if Mr. *Young* had done his duty, and, on the other hand, the course of events by his not doing his duty, I think the justice of the case will be fully

met by what my learned brethren have indicated, viz., that the vendor will repay to the purchaser the whole interest which he has received except what is attributable to the fourteen days.

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Solicitors: *Crosley & Burn*; *Hollams, Son, & Coward.*

F. G. A. W.

In re HODGSON. BECKETT *v.* RAMSDALE.

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[1883 H. 3229.]

Partnership Debt—Claim against Estate of Deceased Partner—Subsequent Action against Surviving Partners—Joint and Separate Creditors—Res Judicata—Claim against a Deceased Person—Evidence of Claimant—Corroboration.

The creditor of a partnership firm, although not strictly a joint and several creditor, has concurrent remedies against the estate of a deceased partner and the surviving partner; and it makes no difference which remedy he pursues first. But it is necessary that the surviving partner should be present at taking the accounts of the estate of the deceased partner, and that the partnership creditor should not come into competition with the separate creditors of the deceased partner.

A father and son being in partnership, became indebted to the Plaintiffs, who were bankers. The son died, and the father brought an action and obtained judgment for the administration of his son's estate. The Plaintiffs carried in a claim for the debt against the separate estate, being at that time unable to prove the existence of a partnership, and were declared entitled to a dividend. Afterwards the father died, and the Plaintiffs having obtained proof of the partnership, brought an action to make his estate liable for the partnership debt:—

Held (affirming the decision of *Bacon*, V.C.), that the proceedings in the previous action did not constitute a *res judicata* or estoppel so as to prevent the Plaintiffs from recovering the debt; but they were put under an undertaking to postpone their dividend on the son's separate estate to the claims of his separate creditors.

Kendall v. *Hamilton* (1) considered.

There is no rule of law which precludes a claimant from recovering against the estate of a deceased person on his own testimony without corroboration: although the Court will in general require such corroboration.

THE action in this case was brought by Messrs *Beckett & Co.*, bankers at *Beverley*, trading under the name of the "*York and*

(1) 3 C. P. D. 403; 4 App. Cas. 504.

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East Riding Bank," against the executors of *James Hodgson*, deceased, claiming payment of £3189 11*s.* 6*d.*, being the balance of the banking account of the firm of *Hodgson & Co.* with the Plaintiffs.

John Bellshaw Hodgson, the son of the testator, had for some years previous to 1873 carried on the business of a brewer in the neighbourhood of *Beverley*, in partnership with *Thomas Gibson*. The firm had an account at the Plaintiffs' bank. In that year the business was sold to *James Hodgson*, the testator, and he entered into a fresh partnership with his son, which was regulated by a deed dated the 19th of January, 1874.

According to the evidence of Mr. *J. R. Pease*, the managing partner of the Plaintiffs' firm, *James Hodgson* and his son *John B. Hodgson* called at the bank, at *Beverley*, on the 1st of October, 1873, and told Mr. *Pease* that *Gibson* had retired from their firm, and that the father and son were going to be partners, and asked to continue the account with the bank. Mr. *Pease* shewed them the balance due from the old partnership of *Hodgson & Gibson* to the bank, and they asked to be allowed to have it transferred to the new account of *Hodgson & Co.*, which was accordingly done. But there was no entry in the books to shew of whom the new partnership was composed.

On the 5th of September, 1877, the father and son dissolved partnership, and the brewery was thenceforth carried on by the son alone. A notice of the dissolution was advertised in the *London Gazette* and in the *Hull News*. Mr. *Pease*, however, stated that the firm did not take in the *London Gazette* or the *Hull News*, and he and the other Plaintiffs swore that they had no knowledge of the dissolution. The account continued to be carried on without alteration.

Early in November, 1880, *J. B. Hodgson* was too ill to attend to the business, and the Plaintiffs became anxious about the balance which was due from *Hodgson & Co.* Their solicitors, Messrs. *Silvester & Son*, accordingly wrote to Messrs. *Levett & Champney*, the solicitors for *James Hodgson*, a letter, in which they said :—

" Messrs. *Walker & Spink*" (*J. B. Hodgson's* solicitors) " write us that they believe Mr. *James Hodgson* is prepared to accept the

responsibility of the banking account, but that we had better write to you thereon. Our clients have always considered Mr. *James Hodgson* as one of their debtors for the balance, but this should be placed beyond a doubt, and arrangements must be made for reducing the debt within reasonable limits."

On the 8th of November, 1880, Messrs. *Levett & Champney* wrote in reply, saying, "We have seen Mr. *James Hodgson* this morning on the subject of your letter. He denies any liability for payment of the balance due to the *York and East Riding Bank* from his son Mr. *J. B. Hodgson*."

In July, 1881, *John B. Hodgson* died. Immediately after the death of his son, *James Hodgson* took out a summons for the administration of his estate, claiming as creditor to a large amount. In this suit the Plaintiffs carried in a claim against the estate of *J. B. Hodgson* for £3124 13*s.* 4*d.*, the balance due to them from the firm at the time of his death: and the claim was allowed. A dividend of 5*s.* in the pound had been declared, but the Plaintiffs had not yet received any of it.

James Hodgson died in 1883, and on the 29th of May in the same year the Plaintiffs' solicitors wrote to Messrs. *Levett & Champney* a letter in which they gave them notice not to distribute the estate of *James Hodgson* till the balance due from *Hodgson & Co.* had been paid, adding, "We now find that the late Mr. *Hodgson*, the father, was a partner in this firm in and after the year 1875, and no notice, actual or constructive, was given to the bankers on his retirement."

On the 25th of July, 1883, the Plaintiffs brought the present action against the executors of *James Hodgson* for the administration of his estate, claiming the sum of £3189 11*s.* 6*d.* as the balance due at the time of his death from the firm of *Hodgson & Co.*

The Defendants denied the liability of *James Hodgson's* estate, on the ground that he was only a dormant partner in the brewery, and that the Plaintiffs did not know the fact of his partnership and did not give credit to him; and further, that if the Plaintiffs had notice of the partnership they had also notice of the dissolution of the partnership in 1877.

They also contended that the Plaintiffs by proving against the

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estate of *John B. Hodgson* had elected to treat the debt as the separate debt of *John B. Hodgson*, and had released *James Hodgson's* estate from liability.

The cause was heard by *Bacon*, V.C., when his Lordship held that there was sufficient evidence that the bankers had notice of the partnership between *James Hodgson* and his son and gave credit to the firm: and that they had no knowledge, actual or constructive, of the dissolution of that partnership. His Lordship also held that the fact of the Plaintiffs having claimed against the estate of the deceased partner, *John B. Hodgson*, did not prevent them from also claiming against *James Hodgson* as the surviving partner. He therefore declared the Plaintiffs entitled to the relief prayed, and directed an account of what was due on the banking account at the death of *James Hodgson*.

From this judgment the Defendants appealed.

Sir *R. E. Webster*, A.G., *Marten*, Q.C., and *Nalder*, for the Appellants:—

The case is governed by *Kendall* v. *Hamilton* (1), following *King* v. *Hoare* (2). The proof against the son's estate in 1881, was equivalent to a judgment against the son: *Williams* on Executors (3). When a creditor on behalf of himself and the other creditors obtains a decree against an executor that is equivalent to a judgment for all the creditors: *Pennell* v. *Roy* (4). *Turner*, L.J., there says (5): "The cases, in which this Court interferes to restrain creditors from proceeding either in the Courts of this country or in foreign Courts for the recovery of their debts, were also referred to on the part of the respondents; but those cases do not seem to me to aid their case. This Court does not in such cases interfere, as it is called upon to do in the present case, before decree, and its interference after decree is, as I apprehend, founded on this, that the decree is a judgment for all the creditors."

[BOWEN, L.J.:—That does not say that it is a judgment for each.]

(1) 3 C. P. D. 403; 4 App. Cas. 504.
(2) 13 M. & W. 494.
(3) 8th Ed. vol. ii. p. 1009.
(4) 3 D. M. & G. 126.
(5) 3 D. M. & G. 137.

Goate v. *Fryer* (1) lays that down distinctly. Lord *Thurlow* there says that a decree to account and for payment of all debts "gives every creditor who carries in a claim equal to that of a creditor by judgment at law from the date of the decree." The principle is affirmed in *Paxton* v. *Douglas* (2). Again, it is the rule at law that if a creditor sues one member of a firm alone he is considered to have elected to release the other partners: *Munster* v. *Railton* (3); *Scarf* v. *Jardine* (4). And on the same principle, in equity, if a creditor of a firm wishes to pursue his remedy both against the surviving partners and the executors of the deceased partner, he must sue both together: *Hills* v. *M'Rae* (5); *Seton* on Decrees (6); *In re McRae* (7); *Neve* v. *Weston* (8). The effect of the proceedings of the Plaintiffs in the former action is that they have proved their debt and obtained a dividend out of the separate estate of the deceased partner in competition with the separate creditors. They have therefore elected to treat it as a separate and not a partnership debt.

But we also contend that the Plaintiffs have not sufficiently proved their debt to be a partnership debt. The only evidence that they gave credit to the father as a member of the firm is the evidence of Mr. *Pease*, one of the Plaintiffs, and his testimony is not corroborated: and it is a rule of evidence that in claiming against the estate of a dead man the statement of the plaintiff is not sufficient without corroboration: *In re Finch* (9); *Hill* v. *Wilson* (10); *In re Whittaker* (11). Moreover, if the Plaintiffs had notice of partnership they had also notice of its dissolution, which was duly published in the *Gazette*, and afterwards they continued to give credit to the son.

SIR J. HANNEN said that the Court were satisfied as to the questions of fact, and only wished to hear the counsel for the Respondents on the question whether the proceedings which had been taken against the estate of the deceased partner pre-

(1) 2 Cox, 201.
(2) 8 Ves. 520.
(3) 11 Q. B. D. 435; 10 App. Cas. 680.
(4) 7 App. Cas. 345.
(5) 9 Hare, 297.
(6) 4th Ed. p. 1212.
(7) 25 Ch. D. 16.
(8) 3 Atk. 557.
(9) 23 Ch. D. 267.
(10) Law Rep. 8 Ch. 888.
(11) 21 Ch. D. 657.

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cluded the Defendants from recovering against the surviving partner.

Crossley, Q.C., *W. Barber*, Q.C., *Solomon*, and *Silvester*, for the Respondents:—

The right of a creditor of a partnership has always been considered an exception to the general rule, that the liability on a joint contract can only be enforced against the survivor. It arose out of the right of the surviving partner to claim contribution from the estate of the deceased partner; and then it was considered more convenient that the creditors should prove directly against the estate of the deceased partner. There is no *res judicata* against us. It is admitted that we have a concurrent right in equity to prove against the surviving partner and the estate of the deceased partner, and that if we had first sued the surviving partner that would have been no bar to our pursuing our remedy against the estate of the deceased partner: *Liverpool Borough Bank* v. *Walker* (1); *Jacomb* v. *Harwood* (2); *Kendall* v. *Hamilton* (3). It can make no difference that we first prove against the estate of the deceased partner and then sue the surviving partner.

We are not in any way estopped by our conduct in that action. We believed that the father was liable as a partner, but we could not prove it until after our claim was carried in; and the father, who led us into the mistake, if there was one, by denying his liability, was himself present as Plaintiff in the action, and it was his duty to see that the estate was properly administered. He cannot now set up those proceedings against us. We have never received any dividend out of the separate estate of the son, and we are quite willing to amend our proof, if that can be done; or we will undertake not to allow our claim to come into competition with the separate creditors of the son.

Marten, in reply.

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The circumstances out of which this litigation arises are these: the Plaintiffs, who are bankers, seek to recover from the repre-

(1) 4 De G. & J. 24. (2) 2 Ves. Sen. 265. (3) 3 C. P. D. 403.

sentatives of *James Hodgson & Co.* a sum of money in which they say the firm of *Hodgson & Co.* was indebted to them; and they allege that they had notice that *James Hodgson* was a member of that firm, and that they never had any notice or knowledge that *James Hodgson* had retired from that firm, and so withdrawn the authority to his original partner, *John B. Hodgson*, to pledge his credit, and therefore the credit was given to *James Hodgson* and his son, and that *James Hodgson* was liable. The Defendants deny that there ever had been any holding out of *James Hodgson* to the Plaintiffs as a member of the firm of *Hodgson & Co.*, and they further deny that the Plaintiffs had no notice of the withdrawal of *James Hodgson* from the firm.

On the first point, namely, the question whether or not the Plaintiffs had notice of the connection of *James Hodgson* with the firm, the evidence of Mr. *Pease*, one of the Plaintiffs, was distinct and circumstantial. [His Lordship then referred to the evidence of Mr. *Pease* as to his interview with *James Hodgson* and his son in October, 1873.] Now, it is said on behalf of the Defendants that this evidence is not to be accepted by the Court because there is no corroboration of it, and that in the case of a conflict of evidence between living and dead persons there must be corroboration to establish a claim advanced by a living person against the estate of a dead person. We are of opinion that there is no rule of English law laying down such a proposition. The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, it is natural that in considering the statement of the survivor we should look for corroboration in support of it; but if the evidence given by the living man brings conviction to the tribunal which has to try the question, then there is no rule of law which prevents that conviction being acted upon. But, as a matter of fact, it does appear to us that in the present case there is not an absence of corroboration —that there are corroborative circumstances about which there can be no dispute, since they are written documents. It appears upon these documents in the highest degree probable that *James Hodgson* and *John B. Hodgson* should have made the representations which Mr. *Pease* represents that they did make. It appears

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that the firm of *Hodgson & Gibson* was about to be broken up by the retirement of *Gibson*, and, therefore, it would be a desirable thing that the credit given to the previous firm should be extended to the new firm. But if *Gibson* were to retire, leaving *John B. Hodgson* alone, that would have weakened the security which the bankers had for their advances, and it therefore appears in the highest degree probable that the father should have made the representation that he and his son contemplated entering into partnership. That they did enter into partnership is common ground. [His Lordship then referred to other portions of the evidence, and expressed his opinion that they did not throw discredit on, but confirmed, the evidence of Mr. *Pease*.]

Upon the second question of fact, namely, whether or not the Plaintiffs had notice or knowledge of the withdrawal of *James Hodgson* from the partnership, which took place in 1877, it is elementary knowledge that where persons have had dealings with a partnership firm the mere publication of the dissolution in the *Gazette* is not sufficient to affect such persons with notice, if they continue to give credit on the footing of the continuance of the partnership. It is necessary in such a case that actual knowledge should be brought home to the persons who had previously given credit to the firm. In the present case we have the positive statement of every living member of the Plaintiffs' firm that they had no such knowledge, and that they had not in fact become aware of any notice of the dissolution in the *Gazette* or in any of the papers that copied it from the *Gazette*. On these grounds we have come to the conclusion that upon these two questions of fact the judgment of the Vice-Chancellor must be supported.

But then it was said that as a question of law the course which has been pursued by the Plaintiffs precludes them from now having recourse to the estate of the father, and that argument is based upon the decision in *Kendall* v. *Hamilton* (1). Now, in that case it was undoubtedly decided, confirming the decision in *King* v. *Hoare* (2), a case which has always attracted a good deal of attention, that where some members of a firm or some joint contractors are sued and judgment is obtained against them, the matter then passes into a *res judicata*, and is to be treated thenceforth as a

(1) 4 App. Cas. 504. (2) 13 M. & W. 494.

debt against those persons only against whom that judgment has been recovered, and recourse cannot be had to a person who was not joined in that action. That of course must be taken as now clearly established; but in that case it was from the beginning pointed out that there is an exception to that rule, one which had long prevailed in equity, to the effect that when one member of a firm has died, though at law the debt would from that time forth be only the debt of the survivors, in equity recourse might always be had to the estate of the deceased partner. That is very clearly laid down by Lord Justice *Cotton* in the judgment which he delivered on behalf of himself, the present Master of the Rolls, and Lord Justice *Thesiger* in *Kendall* v. *Hamilton* (1), where he says, "It is now well established that a Court of Equity does treat the estate of a deceased partner as still liable to the partnership creditors, though at law the survivor has become solely liable. And it must now be considered as established that the partnership creditor may obtain relief against the estate of the deceased partner without having exhausted his remedy against the survivor." He goes on to say, "It is difficult to understand how the Court of Chancery came to interfere with the legal liability of partners, and although it has done so, it has, in giving the partnership creditor relief, dealt with him in an anomalous way, that is to say, except in cases where there has been no joint estate, the Court has only admitted the partnership creditor to rank against the estate of the deceased, after all his private or separate debts have been paid." That passage has a very important bearing on a matter to which I shall subsequently refer. He says in conclusion: "It is unnecessary to go through the numerous cases which were cited during the argument, but it will be right to refer to the cases of the *Liverpool Borough Bank* v. *Walker* (2) and *Jacomb* v. *Harwood* (3), as in those cases judgments recovered against some of several partners were held not to be a bar to proceedings in Equity against the estate of a deceased partner. But in each of those cases the judgment was not recovered until after the death of the partner, against whose estate the creditor was seeking relief; and the cases, in which relief has

(1) 3 C. P. D. 407, 409. (2) 4 De G. & J. 24.
(3) 2 Ves. Sen. 265.

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been given in Equity against the estate of a deceased partner, certainly establish that from and after his death his estate is subject to a separate or several liability."

Now this view of the law is adopted by almost every member of the House of Lords who took part in the affirmation of the decision. It is stated by Lord *Cairns*, by Lord *Hatherley*, by Lord *Selborne*, and by Lord *O'Hagan*, and finally by Lord *Blackburn*, who says that he had been convinced in the course of the argument by Mr. *Rigby* that that was the law; and it would be impossible for us to resist such a *consensus* of opinion of such high authorities as these. We come therefore, without any hesitation, to the conclusion that this is the correct view of the law. It was argued here that there was a difference between this case and the cases cited, inasmuch as the judgment recovered, or that which is said to make the transaction a *res judicata*, namely, the proof against the estate of the son *John*, took place before the action was brought against the surviving partner *James;* but we are of opinion that that difference in the order of events can make no difference in the principle. What is clearly established by the decision which I have referred to is this, that in the case of a deceased partner there is a concurrent remedy against his estate and against the surviving partner, and we can see no reason why the order of events, where several remedies are pursued, can make any difference as to the liability of the assets of the surviving partner. It was, however, pointed out by Lord Justice *Cotton*, in the case to which I have referred, that though this concurrent remedy has been established by the Courts of Equity, yet it does not put the creditor altogether in the position of a several creditor against the estate of a deceased partner; because, if he were treated to all intents and purposes as a joint and several creditor, he would be entitled to prove with the separate creditors of the deceased partner, which he says is not the case. As my learned colleague, Lord Justice *Fry* (who is more conversant with the practice in these matters than I am), has pointed out, from reports and precedents given in *Seton* on Decrees, it has not been the practice to allow the creditor to compete with the separate creditors of the deceased partner. But it appears to me that that does not go to the root of the matter. A claim has been brought in

this instance against the separate estate of the son, and at the time it was brought in the claim was stated in this manner. They said: "We have always considered that the father was liable, but he now disputes his liability, and we seek to prove against the estate of the son." The father was, in fact, the creditor of the son, who had instituted proceedings in the administration suit. He was therefore present, and had cognizance of all that took place, and in his position of a creditor suing on behalf of himself and all other creditors, it was his duty to the estate to see that no person improperly advanced claims for proof, and therefore it was his duty, when the claim was advanced by the bank, if there was any doubt as to the nature or extent of their claim, to see that it was so framed that the estate of the son which he was to administer should not be prejudiced. Now that he did not do. As a matter of fact no dividend has been received by the Plaintiffs from the estate of the son, and it is in our power now to prevent any injustice being done by the Plaintiffs competing with the separate creditors of the son. That may be effected in the manner that has been suggested by a declaration that the Plaintiffs have consented to postpone any claim they may have upon the estate of the son until his separate creditors are satisfied. This appears to us to meet the justice of the case, and it affords a firm basis for our decision that the judgment of the Vice-Chancellor must be supported. The appeal, therefore, must be dismissed, with costs.

BOWEN, L.J.:—

With respect to a large portion of the ground which the President has traversed, I desire not to add a single word. It is only on account of the somewhat delicate and interesting nature of the questions which have been discussed, and which the President last dealt with, that I add any remarks of my own to what has fallen from him. It has become necessary, in order to meet the case of the Appellants, to consider, at all events to a certain extent, the character of a creditor's right to pursue a remedy in Equity against the estate of a deceased partner. The allegation of the Appellants in this case is to the effect that the father and son being joint debtors only and not jointly and severally liable,

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the bankers, their creditors, by the course which they have taken in proving against the estate of the son, have put an end to their right any further to pursue a remedy against the father. And in respect of this proposition the Appellants invoke, though I think they invoke unsuccessfully, for the reasons I will mention, the judgment in *Kendall* v. *Hamilton* (1). It appears to me to be of considerable importance to bear in mind exactly what *Kendall* v. *Hamilton* did and what it did not decide. Now in order to do that, in a few words I should like to consider the rights in Equity as distinguished from the rights in Law of creditors of a joint debtor. The common law principle that a judgment recovered against a joint debtor is a bar to a further action to be prosecuted against another joint debtor is explained at length in the case of *King* v. *Hoare* (2). There is in the cases of joint contract and joint debt as distinguished from the cases of joint and several contract and joint and several debt, only one cause of action. The party injured may sue at law all the joint contractors or he may sue one, subject in the latter case to the right of the single defendant to plead in abatement; but whether an action in the case of a joint debt is brought against one debtor or against all the debtors, or continued against one debtor or all the debtors, it is for the same cause of action—there is only one cause of action. This rule, though the advantage or disadvantage of it may have been questioned in times long past, has now passed into the law of this country. I should only wish to observe that whether or no the rule by the light of pure reason and unassisted by authority might or might not have recommended itself to modern minds, the rule is by no means a technical rule. It is based, rightly or wrongly, on the idea that a joint debtor has a right to demand, if he pleases, that he shall be sued at one and the same time with all his co-debtors. To enforce this right he is only entitled to plead in abatement, but the right is one of considerable business value, and is so recognised by the law. In order to protect each of the joint debtors, the law treats the cause of action as being a joint one, and as capable of being merged whenever it is pursued to a judgment. It is absorbed and merged in the judgment which is recovered against one of the debtors not only

(1) 4 App. Cas. 504. (2) 13 M. & W. 494.

as against him but as against all the rest, and the object is to prevent the prejudice which the law conceives might arise to a joint debtor who is not being sued, if he were left with future litigation still hanging over his head. All his liability is merged therefore in the judgment,—the old debt disappears and the judgment is left in its place. That is the legal view which has been laid down in *King* v. *Hoare* (1), and that was the real ground of the decision in *Kendall* v. *Hamilton* (2). In *Kendall* v. *Hamilton*, however, it was sought to avoid or to escape from the consequence of this legal doctrine by invoking a supposed principle in Equity which is stated somewhat loosely in the text-books in Equity, that partnership debts are joint and several. Now be it observed that *Kendall* v. *Hamilton* has nothing to do with the pursuit of a remedy against the estate of a deceased partner. An attempt had been made *inter vivos* to extend beyond what was legitimate the doctrine that partnership debts are joint and several. In repudiating that attempt the House of Lords explained in a most valuable way what in their view are the useful limits within which alone language can be properly used to the effect that partnership debts are joint and several. With regard to the reason of the thing, I do not know that anything better can be cited than the language of Lord *Selborne* in *Kendall* v. *Hamilton*. It appears to me that Equity, although it allows the pursuit of a remedy against the estate of a deceased partner, does not consider the debt of the deceased partner as a joint and several debt, but only gives the right to pursue the remedy of a joint debt as if it were a several debt so far as the rights and liabilities of the other joint debtors are not disturbed or prejudiced. It seems to me that Lord *Selborne's* language really shews that that is the true view. In discussing the question of the origin of this principle, he says (3): "There is (as it seems to me) only one really consistent explanation of this course of practice, when taken in connection with the rule in bankruptcy, and with the general principles of law and equity, viz., that derived from the doctrine '*jus accrescendi inter mercatores locum non habet.*' As in several other well-known classes of cases (of which mortgages and security bonds, with

(1) 13 M. & W. 494. (2) 4 App. Cas. 504.
(3) 4 App. Cas. 538.

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penalties, may be taken as examples), Equity controls the operation of a legal contract so as to give effect to the purposes and objects to which it was meant to be subsidiary, so in these partnership cases it controls, *inter mercatores*, the legal effect of survivorship. If that is the principle of the rule, it is one which arises upon death only. The partnership is dissolved by death; but in Equity it is taken as still subsisting, for every purpose of liquidation, just as if it had been dissolved *inter vivos*, and the creditors are taken as still creditors of that partnership. What was before joint thus becomes several, by the dissolution, and by the exclusion in Equity of the survivorship which takes effect in law; and although, when this rule was first established, it might well have been doubted whether it did not give creditors rights for which they had never contracted, there could be no doubt, after it had once become a settled rule, that the rights resulting from it were necessarily implied in all subsequent onerous contracts by co-partners. For this purpose (and, as it seems to me, for this purpose only "—that is as I translate it to exclude the doctrine of survivorship—" and only by the operation of death) all such contracts may be described, as in equity, joint and several." As I said a few minutes ago, the rule at law is, that a several remedy cannot be pursued against joint debtors if the joint debtors object and each has a right to protect himself against that. That is not a technical rule, but a rule based upon supposed convenience of commerce, it seems to me it ought to follow that Equity, although displacing the effect of survivorship when there is a death, would never give such effect to the death of one man as to prejudice the rights of another, and ought only to regard the effect of death as converting a joint into a several debt so far as the interests of the other joint debtors are not prejudicially affected. I think the cases that have been cited before us shew that there is still a shield maintained by Equity to protect the other joint debtors. On the one side there is the case of the *Liverpool Borough Bank* v. *Walker* (1) which was cited by Lord Justice *Cotton* in the case of *Kendall* v. *Hamilton* (2), and certainly not disapproved of by the House of Lords, which lays down a firm principle that a judgment at law against surviving partners does not operate as an extin-

(1) 4 De G. & J. 24. (2) 3 C. P. D. 403, 409.

guishment of a partnership debt in Equity, that is to say, that the doctrine of *res judicata* will not prevent the remedy of pursuit against the estate of a deceased partner. On the other hand we have got an illustration of the opposite extreme in the case of *Hills* v. *M'Rae* (1), which seems to shew that the Courts of Equity have recognized the principle that in pursuing the remedy against the separate estate of the deceased partner it is the proper course to bring the surviving partners before the Court, so that their rights and liabilities in respect of a joint debt may be ascertained and satisfied at the same time. Taking those two cases together, the result appears to me to shew that the debt is still to a certain extent a joint debt, and, as Lord Justice *Cotton* has expressed it, that Equity recognises it as a joint debt, though it will allow the separate remedy. Equity therefore ought to mould that separate remedy so as to protect those who have contractual rights, and so as not to prejudice others by the way in which their co-debtors should be sued.

Now, how far does the doctrine *res judicata* apply in dealing in Equity with the estate of a deceased partner? *Kendall* v. *Hamilton* (2) does not decide the point. The case of the *Liverpool Borough Bank* v. *Walker* (3) would seem to shew that Equity does not apply with the same rigidity the extreme rule of *res judicata* to those classes of cases as the common law, and there may be some reason for that distinction. The doctrine of *res judicata* is a doctrine which the common law finds it convenient to apply to protect joint debtors in the absence of any other adequate machinery for protecting them. But in this equitable machinery employed by the Courts of Equity against the estate of the deceased partner, it seems to me that there is sufficient flexibility to prevent injustice being done to other third parties; and I can see no reason for applying in all its fierce severity the doctrine of *res judicata*, if you can do complete justice without applying that doctrine. In the present case, strict justice can be done in the way in which our judgment will be drawn, and it must not be forgotten that the procedure in the administration suit which has led to the difficulty, is a procedure of which the

(1) 9 Hare, 297. (2) 3 C. P. D. 403; 4 App. Cas. 504.
(3) 4 De G. & J. 24.

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Appellants are the last persons to complain. The proper course to follow in such administration suits will be expressed by my learned Brother Lord Justice *Fry*, who is more familiar with the practice of Equity than myself. But I agree with what he is about to add, although I will now leave him to deal with that part of the case as well as the rest.

FRY, L.J.:—

Upon the first head of inquiry in this appeal, namely, the question of fact, I have nothing whatever to add to what has been said by the learned President. For my own part, I feel very strongly convinced that the conclusion arrived at by the learned Vice-Chancellor was the correct conclusion. Upon the second question, the question of law as to how far the Plaintiffs were precluded by what took place in the administration suit, I will add a few words. I will, in the first place, refer to a passage in the judgment of the Court of Appeal in the case of *Kendall* v. *Hamilton* (1), in which Lord Justice *Cotton*, in pronouncing the judgment of the Court, says (2): "It is now well established that a Court of Equity does treat the estate of a deceased partner as still liable to the partnership creditors, though at law the survivor has become solely liable. And it must now be considered as established that the partnership creditor may obtain relief against the estate of the deceased partner without having exhausted his remedy against the survivor." Now it appears to me that the Court of Chancery and the Chancery Division of the High Court have enforced the remedies against the estate of a deceased partner subject to two conditions. In the first place, they have required that partnership debts shall be postponed to the separate debts, and that upon a very apparent ground; for it is obvious that inasmuch as the partnership debts are paid first from the partnership estate before anything can flow from the partnership estate to the separate estate of the deceased partner, it is not unreasonable by contrast that the partnership debts should be postponed to the separate debts. The second condition is this,—the Courts have required the presence of the surviving partner in some method, shape, or manner, at the taking of the accounts of the partnership.

(1) 3 C. P. D. 403. (2) 3 C. P. D. 407.

The obvious justice and reasonableness of that course I need not occupy the time of the Court in explaining.

There are two cases which obviously arise: the first where the plaintiff in the administration action against the estate of the deceased partner sues as a creditor of the firm; and the second, where a decree has been obtained for the administration of the estate of the deceased by a separate creditor, as in the present case. I will consider what appears to me to be the course of practice in those two cases separately. In the first place, in the case where the plaintiff in the administration action sues as a creditor of the firm, the course of practice seems to me to be well ascertained and determined by the case of *Hills* v. *M'Rae* (1). That was a case which came before Vice-Chancellor *Turner*, than whom there were few greater masters of Equity procedure, and the declaration made by that learned judge in that case was this: "Declare that all persons who are creditors of *Donald M'Rae* the testator, are entitled to the benefit of this order; and that the surplus of the estate, real and personal of the said testator, after satisfying his funeral and testamentary expenses, and his separate debts, was liable in Equity, at the time of his death, to the joint debts then due from the said testator and *George Potter*," the surviving partner, "in respect of the partnership heretofore carried on by them, under the firm of *George Potter & Co.*, but without prejudice to the liability of the said *George Potter* thereto as between himself and the said testator's estate." Then the decree worked out that declaration in this way. It directed that *George Potter*, the surviving partner, should be summoned to attend before the Master in prosecuting the said inquiry, and then it directed that the personal estate should be applied in the first instance in the payment of the separate debts and funeral expenses of the deceased in a due course of administration, and then in payment of the joint debts of the partnership. In that form of decree the two conditions I have referred to were satisfied. It is not necessary for me to consider whether the service on the surviving partner is sufficient, or whether the making of the surviving partner a party to the original action is necessary. When that question arises it can be decided, but that by some means or other

(1) 9 Hare, 297.

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the surviving partner should be brought before the Court in taking the account of the partnership debts appears to me to be plain.

In the second case, namely, where the administration decree is obtained by a separate creditor against the estate of a deceased partner, and proof is afterwards tendered by a creditor of the partnership, there appears to me to be no distinct authority shewing what the course of procedure is, but it appears to me that it is not difficult to mould the procedure so as to make it in substance the same as the decree which was pronounced by the Vice-Chancellor *Turner* in *Hills* v. *M'Rae* (1). I think it would be the duty of the Chief Clerk to ascertain and certify separately the separate debts of the deceased and the partnership debts of the firm in which the deceased was a partner; and it might be possible afterwards by some order, or upon further consideration, to bring the surviving partner before the Court in order that he might dispute the Chief Clerk's finding if he chose, with regard to the partnership debts; and on further consideration it seems to me it would be the duty of the Court to deal with the two separate classes of creditors in a different manner, and to direct the immediate application of the estate of the deceased to the payment of the separate debts; and after those separate debts, and the funeral and testamentary expenses, had been paid, it would then go on to direct the distribution of the surplus among the partnership creditors. In that or in some similar way the two conditions which were satisfied in the case of *Hills* v. *M'Rae* would be satisfied by the decree made on further consideration in an action to which the creditor was not really a party.

Now in the present case it seems to me that the surviving partner having been himself the plaintiff in the action for the administration of the son's estate was bound to have proceeded in such a manner as to satisfy the two conditions which I have mentioned. I think that the proof indicated a claim against the partnership on the part of the bankers, although I admit not with very great distinctness, and I say that it was the duty of the father, who had the conduct of that action, to raise the point whether the bankers really claimed as creditors of the partnership or as creditors of the separate estate of the son, and if they

(1) 9 Hare, 297.

had claimed as creditors of the partnership, then to require the Chief Clerk to find what was the debt and to conduct the subsequent proceedings so as to draw a distinction between the two classes of creditors. Unfortunately the Plaintiff's interest was antagonistic to that course, and such a course was not taken; and it only remains for us to consider whether, notwithstanding that course was not taken, the two conditions can be satisfied in the present case. I think they can, because, in the first place, the surviving partner was there, as he was himself the Plaintiff. He owed a duty to all the creditors for whom he appeared as well as for himself to cut down the amount of the bankers' claim to the right amount. He, therefore, was present on behalf of all the creditors to all intents and purposes. The next condition is, that the surviving member of the partnership shall not enforce his claim until after the separate creditors have been satisfied, and that condition can be satisfied by the undertaking which the Respondents have given at the bar that they will not enforce their right to dividends which were ordered to be paid to them on further consideration, until after all the separate creditors have been paid. In that way substantial justice will be done, and the slip with regard to the estate of the surviving partner will be remedied.

For these reasons, without going into the other portion of the case, I express my concurrence in the views which have fallen from my learned Brethren, and I concur with them in thinking that this appeal must be dismissed with costs.

Solicitors: *C. A. Wright,* agents for *Silvester & Co., Beverley; Collyer-Bristow, Withers, Russell, & Hill,* agents for *Levett & Champney, Hull.*

M. W.

V.-C. B.

1885

Nov. 25, 26, 27.

BLAKE *v.* GALE.

[1885 B. 1333.]

Following Assets—Administration—Delay—Lapse of Time—Acquiescence—Residuary Legatees, Action against, for Restitution—Statutes of Limitation, 3 & 4 *Will.* 4, *c.* 27, *s.* 40 [*Revised Ed. Statutes, vol. vii., p.* 396]; 1 *Vict. c.* 28 [*Revised Ed. Statutes, vol. viii., p.* 36]—*Acknowledgment of Debt—Payment of Interest.*

In 1843 *G.* mortgaged to a firm of solicitors a freehold farm, and also the furniture and farming stock, the mortgagor being permitted to use the furniture and stock but not to sell without consent of the mortgagees. In 1859 *G.* died, having by his will bequeathed the furniture to his unmarried daughters and devised the farm to *A.*, *B.* and *C.* upon trust to allow his unmarried daughters to occupy it, they keeping down the mortgage-interest, and having bequeathed his residuary personal estate to *A.*, *B.* and *C.*, whom he appointed executors upon trust for sale and division among his children. By a codicil the testator directed that his unmarried daughters should pay a rent of £600 for the farm, and on their giving it up it should be let. Under the provisions of the will, and with the knowledge of the mortgagees, who made no objection, two of the testator's four daughters continued to carry on the farm as tenants to the trustees of the will, and for that purpose used the furniture and took to part of the farming stock at a valuation as against their shares of residue. In 1861 the executors, with the knowledge of the mortgagees, sold the remainder of the testator's residuary personal estate, consisting almost entirely of farming stock, and distributed the proceeds among the residuary legatees pursuant to the trusts of the will, the two daughters who were tenants of the farm applying their shares in carrying it on. In 1863 one of these two daughters married, whereupon her husband took a lease from the trustees, and bought out the interest of the unmarried daughter in the stock and furniture. The interest on the mortgage was, by the direction of the trustees, paid to the mortgagees by the tenants of the farm out of the rent, the mortgagees giving receipts to the tenants only. In 1882, the interest having been unpaid from August, 1880, and the security being worthless owing to an existing prior mortgage, the legal personal representative of the surviving mortgagee sued *G.*'s executors for an alleged *devastavit* in having distributed *G.*'s residuary personal estate without providing for the mortgage debt (*Blake* v. *Gale* (1)), when it was declared that the executors were not liable for a *devastavit*, but judgment was pronounced for a sale of the mortgaged premises, and for administration of *G.*'s estate. Under that judgment the Chief Clerk certified that the security was unsaleable, and allowed the payments by the executors to the residuary legatees, but the order on further

(1) 22 Ch. D. 820.

consideration was made without prejudice to any proceedings the plaintiff might take against any other persons than the executors. Thereupon, in 1885, the Plaintiff brought an action against the residuary legatees for payment of the mortgage debt out of *G.'s* assets received by them. The Defendants pleaded the *Statutes of Limitation*, delay, and acquiescence:—

Held, that although the legal debt under the mortgage was still subsisting, and was in no way barred by statute, yet that the Plaintiff's claim against the residuary legatees, being in the nature of an equitable demand, was barred by lapse of time and acquiescence.

IN the year 1840 *William Gale* purchased the manor, manor-house, and farm of *North Fambridge, Essex*, for £12,000, and shortly afterwards mortgaged it for that amount, the property having been valued by a surveyor, for the purpose of that mortgage, at £19,940.

By an indenture of the 30th of August, 1843, *William Gale* mortgaged the equity of redemption of the premises to *Thomas Moore Keith* and *John Joseph Blake*, as security for £2400 and interest half-yearly at 5 per cent. per annum, reducible to 4 per cent. on punctual payment, the mortgage containing the usual covenant by the mortgagor, for himself, his heirs, executors, and administrators, for payment of the principal money and interest. And by the same indenture *William Gale* assigned to *Keith* and *Blake* all the furniture, crops, and live and dead stock then and thereafter in or upon the said premises, or in or upon any other hereditaments which might thereafter be in the possession or occupation of *William Gale*, his executors or administrators, upon trusts for further securing the mortgage debt and interest, but permitting *William Gale* in the meantime to retain and use the same, though he was not to sell the same or any part thereof, without the mortgagee's consent in writing.

William Gale resided on and carried on the farm until his death. By his will dated the 12th of November, 1851, he bequeathed, subject to the direction thereinafter contained, unto such of his daughters as should be unmarried at the time of his decease, all his household furniture and effects in, about, and belonging to his house at *North Fambridge*, and directed that the share and interest in such household furniture and effects of such of his said daughters as might marry after his decease should immediately after such marriage cease, and thereupon devolve

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to his other unmarried daughters, so as absolutely to vest in and belong to the last of his said daughters who might remain unmarried. And the testator devised the *North Fambridge* manor, estate, and farm to his sons, *Joseph Gale* and *James Theobald Gale*, and his brother-in-law, *Richard Knight*, upon trust to permit such of his daughters as might be unmarried at the time of his decease, and so long as they might severally remain unmarried, to reside at and carry on the business of the said farm so long as they thought proper, but upon condition of their regularly paying and keeping down the interest on the mortgages, keeping the buildings and fences in repair, insuring the buildings and properly cultivating the farm: and upon trust, in the events therein mentioned, to sell the said manor, estate, and farm, and (subject to the payments thereby directed) to pay and distribute the proceeds, and the rents and profits until sale, to and equally amongst such of his children, whether sons or daughters, as should be living at the time of such payment or distribution. And the testator bequeathed all his live and dead stock belonging to the *North Fambridge* farm and elsewhere, and all other his residuary personal estate, to the said *J. Gale*, *J. T. Gale*, and *R. Knight*, upon trust to sell the same and pay and distribute the proceeds amongst all his children who should be living at his death, but deducting from the shares of his said sons, *Joseph Gale* and *James Theobald Gale*, advances made to them in his lifetime, and also deducting from the shares of such of his daughters as should be unmarried at his decease, and should be desirous of continuing to reside at and carry on the farm, the full value of the stock and crops on the farm. And the testator appointed the said *J. Gale*, *J. T. Gale*, and *R. Knight*, his executors.

By a codicil dated the 25th of May, 1858, the testator directed that his said manor, estate, and farm should not be sold until after the death of all his children, but that in the event of the marriage of all his daughters or their declining to carry on the farm, the farm should be let by his executors. And the testator directed that the yearly rent of the farm during its occupation by his said unmarried daughters should be £600; and that his "executors" should out of the rent and casual profits of the farm, keep down the interest on the mortgage debts of £12,000 and £2400, and,

after payment thereof, and of the expenses of management, should divide the clear residue and surplus of such rent and casual profits between all his children share and share alike.

The testator died on the 9th of July, 1859, and his will was duly proved by all his executors. He left six children, namely, four daughters, the Defendants *Catherine Gale* (wife of the Defendant *George Gale*), *Ann Knight Westrup* (wife of the Defendant *Edward Westrup*), *Rebecca Pulley*, widow, and *Jane Orpwood*, widow, and his said two sons, *Joseph Gale* and *James Theobald Gale*.

The testator died possessed of, besides real estate, personal estate of sufficient value to pay the mortgage debts, the personal estate consisting almost entirely of the furniture and stock comprised in the mortgage; and in the year 1861 his executors, with the knowledge, it appeared, of the mortgagees, who were solicitors, sold the personal estate, and, after payment of his simple contract debts and funeral and testamentary expenses, distributed it among the residuary legatees, including the Defendants, his four daughters, without making any provision for the mortgage debt of £2400. In passing the succession duty accounts the usual deductions for the mortgage debts were allowed by the Inland Revenue Department.

On the testator's death his two then unmarried daughters, the Defendants *Catherine Gale* and *Ann Knight Westrup*, then *Ann Knight Gale*, in pursuance of the provisions in the will and codicil, remained in occupation of the farm as tenants to the trustees, and continued to carry it on with the aid of their shares of their father's personal estate until the marriage of *Catherine*, when they gave up their tenancy. The greater part of the testator's furniture and live and dead stock on the farm at his death was purchased or taken over by the two daughters for the purposes of the farm. In 1863 the Defendant *George Gale*, on his marriage with the Defendant *Catherine Gale*, took a lease of the farm from the testator's trustees at a rent in excess of that previously paid by the two daughters under the will and codicil, and thereupon bought from *Ann Knight Gale* her interest in the furniture and stock. From the death of the testator the interest on the mortgage to *Keith* and *Blake* was regularly paid half-yearly, first by the two unmarried daughters until 1863, when

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George Gale became tenant, and from that time down to 1880 by *George Gale* alone, the interest being, by the direction of the trustees, always deducted from the rent.

Thomas Moore Keith, one of the mortgagees, died in 1869, and *John Joseph Blake*, the surviving mortgagee, in 1873.

In 1880, owing to the prevailing agricultural depression, *George Gale* became unable to continue the payments of interest, whereupon, on the 2nd of March, 1882, the then legal personal representatives of *John Joseph Blake*, on behalf of themselves and all other creditors of *William Gale*, commenced an action against the said *Joseph Gale* and *James Theobald Gale*, the surviving executors of the testator, *William Gale*, and against the executors of the said *Richard Knight*, the other executor, who had died in 1876, for an account and payment of the mortgage debt, for sale of the mortgaged premises in default of payment, and, in case the proceeds of sale should be insufficient, for an order for payment of the deficiency against the Defendants *Joseph Gale* and *James Theobald Gale* personally, and against the Defendants, *Knight's* executors, to the extent of their testator's assets, for the administration of *William Gale's* estate, and, if necessary, of *Knight's* estate also. That action came on for trial on the 25th of January, 1883 (*In re Gale; Blake* v. *Gale* (1)), the main question being whether *William Gale's* executors were liable for *devastavit* in having distributed their testator's estate without providing for the mortgage debt. His Lordship, however, held, as stated in the report, that any claim founded on the *devastavit* was barred by the *Statute of Limitations*, but that the Plaintiffs were entitled to foreclosure, and to an order for administration of *William Gale's* estate.

A question afterwards arose as to the precise form of the judgment, and it was ultimately drawn up to the following effect, being dated the 21st of March, 1883 :—

First, an account was directed of what was due to the Plaintiffs under the mortgage debt and for their taxed costs of the action, so far as not increased by their claim as for a *devastavit;* then there was an order for reconveyance on payment of what should be found due on such account, and for sale in case of default;

(1) 22 Ch. D. 820.

and it was declared that, in case of the proceeds of sale being insufficient, the Plaintiffs "were entitled to receive satisfaction for the deficiency out of the assets" of the testator, *William Gale*. And after a declaration that the Defendants were not liable for the alleged *devastavit*, administration accounts and inquiries were directed against the real and personal estate of the testator, *William Gale*, and a consequential account against the personal estate of *R. Knight*, the deceased executor.

By his certificate in that action, dated the 26th of July, 1883, the Chief Clerk found that there was due to the Plaintiff (the then sole representative of the surviving mortgagee), for principal and interest under the mortgage and costs of the action, the total sum of £2964 2*s*. 4*d*., the interest on the principal mortgage debt being computed from the 30th of August, 1880, when the payments of interest ceased.

By a further certificate dated the 23rd of December, 1884, the Chief Clerk found that default had been made in payment of the £2964 2*s*. 4*d*., and that, as it appeared that the Plaintiff's security was of no value, he had not proceeded to a sale of the equity of redemption: that all the debts of the testator, *William Gale*, had been paid except the Plaintiff's debt; that the Defendants, the surviving executors, had received personal estate of the testator to the amount of £11,400 13*s*. 7*d*., and had paid or were entitled to be allowed thereof sums to the amount of £10,725 19*s*., leaving a balance due from them of £674 14*s*. 6*d*.; that the payments allowed included payments therein mentioned to the total amount of £6208 19*s*. 9*d*., on account of their shares of residue, to the testator's four daughters above named; and that neither *Richard Knight*, the other executor, nor the Defendants, his executors, had received any part of the testator's personal estate.

The Defendants, the surviving executors, having paid into Court the £674 14*s*. 6*d*. so found due from them, an order was, on the 28th of February, 1885, made on the further consideration of that action directing taxation of costs, the Defendants' costs to be paid out of the £674 14*s*. 6*d*. in Court in priority to the Plaintiff's; and after payment of costs the residue, if any, of the fund to be paid to the Plaintiff on account of the mortgage debt. And the order was expressed to be made without prejudice to any

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proceedings the Plaintiff might be advised to take against any other persons than the Defendants to that action. The fund in Court was, however, not more than sufficient to answer the costs of that action.

The Plaintiff in that action thereupon commenced the present action against the testator's four daughters, and the husbands of the two who were married, claiming a declaration that the Defendants were severally liable to refund so much of the assets of the testator received by them respectively as might be necessary to make good to the Plaintiff the amount due to him for principal, interest, and costs in respect of the mortgage of the 30th of August, 1843; and payment to him accordingly.

In their statement of defence the Defendants craved the benefit of the *Statutes of Limitation*. After stating that the final distribution of the testator's personal estate took place in 1861, they alleged that for more than twenty years previous to the issue of the writ the Defendants had received nothing and paid nothing to or in respect of the testator's personal estate, and had not in any way recognised, either by payment, acknowledgment, or otherwise, any liability in respect of the mortgage debt of £2400; that *Keith & Blake*, the mortgagees, were solicitors carrying on business in partnership at *Norwich*, and were well aware of, acquiesced in, and approved of the final distribution of the testator's personal estate, and were aware that no part thereof was retained to meet the mortgage debt, and that neither they nor those claiming under them had ever, until the institution of the present action, made any claim against the Defendants in respect thereof; but that, on the contrary, they had allowed the Defendants to receive and use their respective shares of the testator's assets as if no liability was attached thereto, and had thereby debarred themselves from now making any claim against such shares or against the Defendants personally; that *Keith & Blake* were in fact content with the security of the mortgaged premises, and allowed the testator's personal estate to be distributed, and had always received the interest on the mortgage debt first from the two unmarried daughters and then from *George Gale*, not out of the personal estate at all, but solely out of the rents and profits of the mortgaged premises.

The Plaintiff joined issue, and the action now came on for trial.

The facts, other than acquiescence and approval, alleged in the statement of defence were duly proved by the Defendants, Mrs. *Gale* and Mrs. *Westrup*.

The principal evidence of acquiescence on the part of the mortgagees and knowledge by them of the dealings with the testator's estate, was contained in a lengthy correspondence which passed between Messrs. *Keith, Blake, & Keith*, of *Norwich*, as the mortgagees' solicitors, on the one hand, and the executors and trustees and their solicitor, Mr. *Griffin*, on the other. On the 1st of September, 1859, shortly after the testator's death, Mr. *Griffin* wrote to Messrs. *Keith, Blake, & Keith* informing them fully of the nature and effect of the dispositions made by the testator and of the probable intention of the two unmarried daughters to carry on the farm in accordance with their father's wish with their shares of the estate, and added, "In any case you will observe the executors, who are also trustees of the will, will be the persons to whom your clients will have to look for payment of their interest, and there is no reason to expect it will be paid with less punctuality, or the business carried on less effectively than it was by the late Mr. *Gale*." In reply Messrs. *Keith, Blake, & Keith* wrote on the 3rd of September, 1859, to Mr. *Griffin*, "We shall be very glad to hear that Mr. *Gale's* daughters are able to continue at *North Fambridge* with comfort as well as advantage to themselves."

From that time down to the year 1880 Messrs. *Keith, Blake, & Keith* received and acknowledged regular half-yearly cheques for interest, first from the two unmarried daughters and then from the Defendant *George Gale*, as tenants of the farm, the interest being, by the direction of the trustees as the landlords, deducted from the rent.

On the 11th of September, 1865, upon the marriage of *Ann Knight Gale* with the Defendant *Edward Westrup*—a fact which was known to the mortgagees—a settlement was executed of certain bank shares to which she was therein recited to be "amongst other things absolutely entitled in her own right." The settlement did not mention the source from which Mrs.

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Westrup had derived these bank shares, nor did it purport to settle any property belonging to her other than those shares; but she stated in evidence that on receiving her share of her father's personal estate she "put it in the farm," and that "all that was left out of the farm was settled upon her."

Mr. *Westrup* stated that when he married he knew nothing about the testator's debts, and that, so far as he knew, his wife had no property beyond what was included in the settlement.

The Defendant, *Catherine Gale*, stated that all the money she received as her share was spent in carrying on the farm; that not a penny of it was left.

Marten, Q.C., and *Freeman*, for the Plaintiff:—

Our claim for payment of the mortgage debt is not barred by statute, payment of interest being an acknowledgment: 3 & 4 Will. 4, c. 27, s. 40; 1 Vict. c. 28; *Chinnery* v. *Evans* (1); *Toft* v. *Stephenson* (2); *Roddam* v. *Morley* (3); *Pears* v. *Laing* (4); *In re Powers* (5). The debt having thus been kept alive against *William Gale's* executors, our claim against the residuary legatees is not statute-barred, and they must, therefore, refund the moneys they have received: *Fordham* v. *Wallis* (6).

Hemming, Q.C., and *B. B. Rogers*, for the Defendants other than Mr. and Mrs. *Westrup*:—

The claim is too late. Even if it is not statute-barred, which we will consider presently, it is barred by delay and acquiescence. What was done was with the full knowledge of the mortgagees. They stood by and allowed without protest the sale and distribution in 1861 of the testator's personal estate, consisting almost entirely of the furniture and farming-stock comprised in the mortgage. Knowing of the sale and having the right as mortgagees to forbid it, their inaction was acquiescence in the strictest sense. Then follows a lapse of more than twenty years, during which a large part of the distributed estate was sunk and lost in the farm and no claim to refund was made against the residuary

(1) 11 H. L. C. 115.
(2) 1 D. M. & G. 28.
(3) 1 De G. & J. 1.
(4) Law Rep. 12 Eq. 41.
(5) 30 Ch. D. 291.
(6) 10 Hare, 217.

legatees. The case is covered by *Ridgway* v. *Newstead* (1), where it was held that lapse of time and intervening circumstances were a sufficient answer to a mortgagee's suit against legatees so far as it called upon them to refund; and that although the legal claim against the assets unadministered might remain, yet the equitable demand (which is the claim made here) against the legatees was gone. It has already been found by the Chief Clerk in the first action that the distribution of the testator's personal estate was rightly made, for the payments by the executors to the Defendants were allowed in the accounts.

In the next place, if the acquiescence is not a sufficient answer, we say that the statute has run. The only acknowledgments relied on within the statutory period are payments of interest by *George Gale* by the direction of the trustees. *George Gale* was not a beneficiary, nor does it appear whether any and what part of his wife's share passed to him. But it is suggested on the other side that his payments were, in effect, payments by the trustees, and therefore stopped the running of the statute in favour of the residuary legatees. That is not so. A payment by executors, as such, might possibly have that effect; but a payment by trustees of real estate, as such, is not an acknowledgment by the residuary legatees, even though the executors and the trustees happen to be the same persons. *Fordham* v. *Wallis* (2), which was the converse case, established this principle, and all the cases cited against us are consistent with it.

Begg, for the Defendants Mr. and Mrs. *Westrup* :—

In addition to the equitable defence set up by the other Defendants, I say that, assuming Mrs. *Westrup's* remaining share of the testator's personal estate was represented by the bank shares settled by her on her marriage, the settlement was a *bonâ fide* settlement of such share; that Mr. *Westrup* was a purchaser for value without notice; and consequently that neither Mr. *Westrup* nor the share so settled were under any liability to any of the testator's creditors: *Spackman* v. *Timbrell* (3); *Noble* v. *Brett* (4); *Dilkes* v. *Broadmead* (5).

(1) 3 D. F. & J. 474.
(2) 10 Hare, 217.
(3) 8 Sim. 253.
(4) 24 Beav. 499, 505.
(5) 2 D. F. & J. 566.

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Marten, in reply:—

[BACON, V.C.:—There can be no doubt that the legal debt is still subsisting; I will not, therefore, trouble you on that point. The only question is whether, having regard to the nature of the mortgage, it being a positive mortgage of chattels, and also having regard to the forbearance of the mortgagees and to the fact that no claim of any sort was made against the residuary legatees during the whole period from the death of the testator to the date of the commencement of the present action, you do not come too late on equitable grounds.]

In *Ridgway* v. *Newstead* (1) it was held, on the second branch of the case, that lapse of time was no bar to a claim by the mortgagee against the residuary devisees, and to that extent, therefore, the case is an authority in our favour. The residuary legatees knew that in ascertaining the net residue for the purpose of duty, the mortgage debts due from the testator's estate were deducted, and they cannot now say they were entitled to put into their own pockets part of the residue which ought to have been applied in payment of the testator's debts. Moreover, the interest on the mortgage was paid by the beneficiaries themselves. Thus there is no equitable circumstance in their favour to sustain the defence of acquiescence. There is no rule in equity, any more than at law, that the mere non-suing by a specialty creditor for any period within the statutory limit of twenty years is such negligence as deprives him of the right of requiring payment of the specialty debt: *In re Baker* (2). In *Hooper* v. *Smart* (3) it was held, in an administration suit, that after residuary legatees had been declared entitled to a fund and it had then been assigned for value by them, creditors of the testator subsequently ascertained in another suit were entitled to the fund in priority to the assignees of the residuary legatees.

[BACON, V.C.:—*Ridgway* v. *Newstead* appears to me to be almost identical with this case.]

That case is distinguishable on two grounds: first, the security being leasehold was of a wasting or doubtful description, which

(1) 3 D. F. & J. 474. (2) 20 Ch. D. 230.
(3) 1 Ch. D. 90.

the mortgagee should have realized without delay. Here the security was a permanent and safe security of freehold property. Secondly, none of the legatees in that case paid interest to the mortgagee, as was done in the present case; and one of the persons sought to be made liable was an annuitant, a stranger to the estate, who could not justly be called upon to refund.

The term "acquiescence" is open to much criticism: there was no acquiescence here within the definition laid down by the Court of Appeal in *De Bussche* v. *Alt* (1) on the authority of Lord *Cottenham* in *Duke of Leeds* v. *Earl Amherst* (2).

Hemming:—

None of the new cases cited in the reply have any bearing on the present question. They had nothing to do with refunding. *In re Baker* (3) was a case of enforcing a covenant against the executor of the covenantor: and *De Bussche* v. *Alt* (4) was entirely a case of agency.

BACON, V.C.:—

This, in many senses, is a very remarkable case. The facts are not in dispute. The testator bought for £12,000 a very valuable estate, believed to be worth more than the money, for he very readily mortgaged it for £12,000, and for £2400; and for those two sums it was considered by everybody as a perfectly good security.

The testator by his will constitutes residuary legatees. There is a provision in the will, which I need not dwell upon, which points to his daughters carrying on the business of his farm, and in those days, I suppose, farming was a more lucrative business than it has become of late years. But the Defendants in this action are sued as residuary legatees. Well, what took place was this: on the testator's death the two unmarried daughters became tenants of the farm. Out of the rent reserved the interest on the mortgages was duly paid. On the marriage of one of the daughters, her husband became tenant of the farm. All this was done with the full knowledge of the mortgagees—I say with

(1) 8 Ch. D. 286, 314.
(2) 2 Ph. 117, 123.
(3) 20 Ch. D. 230.
(4) 8 Ch. D. 286.

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the full knowledge, because it is not in the slightest degree disputed; it is not only to be inferred, but it is proved by the facts of the case.

I relieved Mr. *Marten* from any argument upon the *Statute of Limitations* as to the Plaintiff's demand. I think that the mortgagees' right of action was not in the least impeached or impugned by what had taken place.

But then presents itself another consideration, which was gone into at great length in the case of *Ridgway* v. *Newstead* (1), and, although it is true, as Mr. *Marten* has pointed out, that the facts in *Ridgway* v. *Newstead* were in some degree different, yet the principle upon which the decision in *Ridgway* v. *Newstead* went is, in my opinion, identical with that which is applicable to this case, and whether the distribution was of personal estate or real estate makes no kind of difference, with this exception, that, if there remained any real estate of the testator upon which the present Plaintiff could lay his hands, then the *Statute of Limitations* would be no bar to his making the claim available against that estate. But what is claimed here is not the real estate, but the residuary personal estate, which in the year 1861 was distributed by the executors, and paid to the residuary legatees.

There is no difference between a residuary legatee and another legatee. They are both of them legatees. They both of them are entitled to receive and do receive legacies. The legacies, as far as the executors were concerned, were paid in the year 1861. At that time the debt due on the covenants of the mortgage deed was a right that was vested in the present Plaintiff's predecessors, and the right of action for that subsists. The Plaintiff's present claim is an equitable demand. It purports to be made under a doctrine only of a Court of Equity founded on the most just principles, and amounting to this, "I have a right to resort to the residuary estate for payment of the money due under the covenant; although twenty years or more have elapsed since the testator's death I still have that right." That is very true, provided the Plaintiff can find anything to which the doctrine would apply. But the demand here is this: "You, the legatees, received in 1861 money which I might then have insisted on

(1) 3 D. F. & J. 474.

being applied in discharge of my debt; it was my money that you received, give it me back." That is purely an equitable demand; and being a plain equitable demand, and nothing else, it is open to that well-known principle as strong as any *Statute of Limitations*—stronger perhaps—on which this Court declines to entertain stale demands.

No period can be mentioned, from the year 1859, when the testator died, when that demand might not have been preferred. The reason it was not preferred is plain on the face of the case—it was because everybody believed that the mortgaged property was enough to satisfy the mortgage debt, and the mortgagees did not trouble their heads about any other part of the testator's estate: they were satisfied to rely on their mortgage. But they at no time claimed anything against the legatees, and there was no period either from the date of the testator's death or from the year 1861 (when his residuary personal estate was distributed) until the present time, at which they might not have made their claim against the Defendants as they now make it; and now it is presented to the Court as an equitable claim, and an equitable claim only.

The executors, who were attacked originally in the administration action for having disposed of the residuary estate amongst the residuary legatees, were acquitted by the Court from all blame in that respect. The payments made by them were investigated in the Chief Clerk's Chambers: they appear in the certificate which the Chief Clerk has made, and the sums which they, the executors, paid, and as the Court has decided, so far as their liability is concerned, lawfully paid, were those sums which have been so often mentioned in the course of the proceedings here. Then am I to shut my eyes to the principle of the Court, that, whatever may have been the dealings between the parties, if for twenty years or more no claim is made by the man who has an equitable right to claim, a claim after that lapse of time cannot be entertained? Can any instance be shewn me where the Court has ever entertained such a claim? *Ridgway* v. *Newstead* (1) goes into a variety of circumstances which perhaps are not applicable to this case, but the principle there is this: "You should have

(1) 3 D. F. & J. 474.

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come before if you wanted anything; you have in the meantime suffered dealings and transactions to take place." Here, one of the residuary legatees who was examined says she put all her money into the farm, and that it has been lost. Another of the legatees says she put part of her share into the farm and that she settled so much as she had left on her marriage with Mr. *Westrup*. All this there is no pretence for saying that the mortgagees did not know perfectly well, and it is after twenty years—after they have failed to fix the executors with a *devastavit* for having distributed the testator's general estate amongst his residuary legatees, that they or their present representative come to the legatees and say, "You must pay back what you received because the executors ought not to have paid you," That is the whole case. I can find no answer whatever to this defence which has been set up and clearly proved, that for more than twenty years previous to the issue of the writ in this action the Defendants have received nothing from, and paid nothing to or in respect of, the testator's personal estate, and have not in any way recognised, either by payment, acknowledgment, or otherwise, any liability in respect of the mortgage debt. They might have gone further, but that is enough for the purpose.

Since I find that the claim now preferred, which is purely an equitable and not a legal claim, might have been preferred at any time during those twenty years, and that there is no pretence for saying, and in fact no allegation by the Plaintiff, that those under whom he claims were not perfectly aware of the distribution which took place—indeed no such allegation could be made because they admitted their knowledge in the attempt to fix upon the executors a liability for the *devastavit* of which they complained—in my opinion this action is unsustainable, not only on the ground of acquiescence, which is, I admit, a very flexible term and open to the criticism which it underwent in *De Bussche* v. *Alt* (1), but also on the ground of the wilful, determined, and deliberate refusal and neglect to make their claim which, if it had been made earlier, might possibly have had some good foundation, but which is now brought forward at a time when there can be nothing to answer it. In the year 1861 these ladies received that

(1) 8 Ch. D. 286.

which, as legatees, they were entitled to, and they received it lawfully, as the decree in the other action establishes: and upon the ground that they have received it lawfully, that it has never been subject to an equity which the Plaintiff can now set up or invoke against them, I say that, in my opinion, the claim is untenable, and I therefore dismiss this action with costs.

Solicitors: *Blake & Heseltine,* for *Keith, Blake & Co., Norwich*; *Duffield & Bruty.*

G. I. F. C.

In re MILLER'S DALE AND ASHWOOD DALE LIME COMPANY.

Limited Company—Winding-up—Special Resolution—Increase of Capital—General Meetings—Interval of "not less than fourteen days"—Invalidity of Resolution—Rights of Creditors—Contributories—Companies Act, 1862, *s.* 51 [*Revised Ed. Statutes, vol. xiv., p.* 214].

Under sect. 51 of the *Companies Act,* 1862, there must be an interval of not less than fourteen clear days between the meeting at which a special resolution—as for instance, for an increase of capital—is passed and the meeting confirming the resolution. If the interval is less than fourteen clear days the statutory defect in the resolution only affects the position of the company and its shareholders *inter se,* and does not concern the creditors.

Thus, where a director of a company took shares in new capital raised under a resolution passed and confirmed at meetings the interval between which was thirteen days only, and the company afterwards went into liquidation, he was held to be precluded from objecting to the validity of the resolution as a ground for his removal from the list of contributories.

In re Railway Sleepers Supply Company (1) distinguished.

ADJOURNED SUMMONS.

This was an application by *George Ormerod* to have his name removed from the list of contributories of the *Miller's Dale and Ashwood Dale Lime Company* (*Buxton*), *Limited,* in respect of ten shares of £100 each. The company was in course of voluntary liquidation under a supervision order made in the early part of 1885.

The company was formed in 1868, under the name of the

(1) 29 Ch. D. 204.

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Miller's Dale and Oldham Lime Company, Limited, with a capital of £10,000, and *Ormerod* had been a director since 1873. The articles of association authorized the company by special resolution at any general meeting to increase its capital to any sum not exceeding £10,000.

In January, 1879, the company purchased an estate at *Ashwood Dale*, and thereupon assumed its present name. In order to raise the purchase-money an extraordinary general meeting of the shareholders was held on the 3rd of January, 1879, at which a special resolution was passed that the capital of the company should be increased from £10,000 to £30,000 by the issue of 200 new shares of £100 each.

This resolution was purported to be confirmed at a subsequent general meeting on the 17th of January. *Ormerod*, having at the meeting of the 3rd of January offered to take ten of the new shares, forwarded to the secretary, on the 16th of January, the sum of £105 on account of such shares, and the shares were entered in his name on the register.

His contention was that his offer to take the shares was made subject to the condition—though this was denied by the secretary—that £80 of the £105 paid should be appropriated to the payment of the amount due on the original shares held by him, and to the further condition—which the chairman in fact refused to assent to—that the calls on the new shares should be limited to £20 per share per annum.

The new share capital was subscribed for by original shareholders of the company, and calls to the total amount of £60 were made upon and paid by the holders of new shares, with the exception of *Ormerod*, who stated that he had never received any notice of the calls in respect of his shares, and that he was not aware until April, 1885, after the commencement of the winding-up, of his being on the register for the ten shares. The secretary stated, on the contrary, that notices of the calls were served on all the holders of new shares, including *Ormerod*, though no allotment letters were ever sent to them or formal allotment made, inasmuch as the names of the intending new shareholders had been already taken down in writing by the secretary at the meeting of the 3rd of January.

From the evidence of the liquidator it appeared that *Ormerod* had not only been entered on the register as the holder of ten new shares, but that he was present at successive meetings of the directors at which statements of assets and liabilities were adopted containing entries of the new shares issued, including the ten shares standing in his name.

No dividend had been paid on the new share capital.

Ormerod, having been settled on the list of contributories in respect of the ten new shares, took out the present summons, which, having been dismissed by the Chief Clerk, was now adjourned into Court.

Marten, Q.C., and *S. Hall*, for *Ormerod*:—

Sect. 51 of the *Companies Act*, 1862, is imperative that between the two meetings for passing a special resolution there must be an interval of "not less than fourteen days," whereas here the interval was only thirteen days; consequently the resolution for the issue of new shares was absolutely void: *In re Railway Sleepers Supply Company* (1). *Ormerod* is therefore not under any liability as a contributory, notwithstanding that he is a director: *Stace and Worth's Case* (2); nor has he by his conduct estopped himself from denying that he was a shareholder: *Bank of Hindustan* v. *Alison* (3).

Millar, Q.C., and *Farwell*, for the liquidator:—

The objection to the validity of the resolution is too late: *Oakes* v. *Turquand* (4); *Central Railway Company of Venezuela* v. *Kisch* (5). The company's capital having been *de facto* increased and new shares issued, *Ormerod* is bound by acquiescence and cannot now object to any irregularity in the manner in which the capital has been increased: *Richmond's Case* (6). The acquiescence here was even longer than in that case. The invalidity of the resolution might possibly have entitled *Ormerod* to relief had the company been a going concern; but now that a winding-up order has been made the creditors have a right to intervene:

(1) 29 Ch. D. 204.
(2) Law Rep. 4 Ch. 682.
(3) Ibid. 6 C. P. 54, 222.
(4) Law Rep. 2 H. L. 325.
(5) Ibid. 2 H. L. 99.
(6) 4 K. & J. 305.

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Challis's Case (1); *Hare's Case* (2); *Campbell's Case* (3); *Wheatcroft's Case* (4).

[They also referred to *Brown* v. *Black* (5).]

Marten, in reply:—

None of the cases cited against me go to the original invalidity of the creation of new shares; and there can be no estoppel by conduct when the thing done had no legal validity in the first instance.

BACON, V.-C.:—

This is a very peculiar case—one of the strangest I have ever known, and of the many odd things connected with it not the least strange is the argument which has been addressed to me on behalf of the applicant.

Mr. *Marten* opened his case with a proposition which, if it can be maintained, disposes of the whole matter. He referred to the 51st section of the *Companies Act*, 1862, which enacts that there must be an interval of not less than fourteen days between the meeting at which a special resolution, such as this for the increase of capital, is passed and the meeting at which that resolution is confirmed. Here the interval was not sufficient. The meetings were held on the 3rd and 17th of January, thus leaving an interval of thirteen days, and that is not enough. The interval should have been fourteen clear days exclusive of the days of meeting; and on the authority of Mr. Justice *Chitty* such a defect is fatal. Now if the dispute here were simply between the company and its shareholders and directors, undoubtedly that would be so; but that is not the case I have now to deal with. Such an objection as that which is now raised does not apply where the creditors of the company are concerned. Mr. *Marten* says, that the resolution was absolutely void as not having been passed in the manner required by the Act, and that therefore no fresh capital whatever could be raised; but then fresh capital was *de facto* raised. Not only were new shares *de facto* issued,

(1) Law Rep. 6 Ch. 266.
(2) Ibid. 4 Ch. 503.
(3) Ibid. 9 Ch. 1, 15, 16.
(4) 42 L. J. (Ch.) 853.
(5) Law Rep. 15 Eq. 363; 8 Ch. 939.

but money was actually raised. Have the creditors nothing to do with that? The cases referred to point out this plain principle, that there may be equities between shareholders and the company entitling shareholders to be removed from the list of contributories; but that is no answer to the legal rights of the creditors who have trusted them both. If it were held otherwise, what a door would be opened to fraud of every kind! Suppose a number of ticket-of-leave men combined to defraud the public by forming a company and then passing a resolution to increase its capital. They might leave out a day on purpose between the two meetings, so that nothing done by them at the meetings should be lawful. Then they might raise the capital, get subscriptions from the unsuspecting public and spend the money; and the creditors would find to their cost that they had no redress against these men.

Mr. *Marten's* argument is unanswerable as far as the Act of Parliament is concerned, but it leaves out this consideration—that there is a distinction between the rights of shareholders *inter se* and the rights which they owe to the creditors of the company. Mr. *Ormerod* says, "I find my name on the list of shareholders, and I want to have it taken off as it was placed there illegally." But cannot the company say to him, "That may be so, but you have acted as director all these years: you have had the benefit of the shares, and you can have nothing back now that the rights of creditors have intervened." All the cases referred to, except the common law cases, recognise that as a plain principle: otherwise the statute would enable a body of persons to form a company, become directors, and then arrange to become bankrupt, when the public would be told by the directors, "We are a set of knaves: we meant to cheat you and we have done so; and you can recover nothing from any of us because of this statutory defect."

Mr. *Ormerod* was a director all these years, and now he says that he did not know he was on the register. But I cannot hear him say that. I think that the order made by the Chief Clerk was perfectly right, and that neither in law nor equity has Mr. *Ormerod* any right to have his name removed from the list, and that as between him and the company he is a shareholder.

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If he is to be relieved at all it must be on equitable grounds; and as between him and the creditors he has no shadow of a claim to be relieved. When I am told that he took these shares on conditions which were not complied with, the thing becomes almost ludicrous. He, a director, says that he made conditions about payment of calls: but he could not stipulate for his own benefit that he should only pay by certain instalments. His statement is contradicted even so far, and I do not think it worth while to say which of the two statements is, in my opinion, true, for the principles are so clear as to be beyond question.

I think the creditors are entitled to have the name of this gentleman placed on the list, because I must hold that it was placed there and retained there with his knowledge in spite of what he now says.

I therefore dismiss the summons with costs.

Solicitors: *Crowder, Anstie, & Vizard*, agents for *Simpson, Hockin, & Raby, Manchester; Pritchard, Englefield, & Co.*

G. I. F. C.

V.-C. B. 1885 *Dec.* 18.

MORGAN *v.* BRISCO.

[1884 M. 1111.]

Practice—Specific Performance—Defaulting Defendant—Further Consideration—Form of Order.

Form of order on further consideration in an action for specific performance by vendor where the Defendant has persistently endeavoured to evade the judgment.

THIS was an action by a vendor for the specific performance by a purchaser of an agreement dated the 23rd of January, 1884, for the sale of certain freehold property.

On the 4th of February, 1885, his Lordship pronounced judgment for specific performance, and ordered inquiries whether a good title could be made, and if so, when it was first shewn; and if a good title were made, the purchaser was to pay interest at 5 per cent. on £2902 10*s.*, the balance of the purchase-money, from the 25th of March, 1884, when the purchase ought to have been

completed: an account of rents and profits received by the Plaintiff since that date was also ordered: his costs were to be taxed: the rents and profits found to have been received by the Plaintiff were to be deducted from the purchase-money, interest, and costs; and upon the Plaintiff executing at his own expense a proper conveyance to the Defendant, such conveyance to be prepared at the expense of the Defendant, and delivering the title-deeds to the Defendant, the Defendant was to pay to the Plaintiff the balance which should be certified to remain due to him after such deduction as aforesaid. Further consideration adjourned; liberty to apply.

On the 21st of July, 1885, the Chief Clerk certified that a good title was shewn on the 13th of February, 1884, and that £3300 4*s.* 4*d.* was due by the Defendant to the Plaintiff in respect of purchase-money, interest, and costs.

On the 24th of July, 1885, his Lordship dismissed with costs a summons by the Defendant to have the Chief Clerk's certificate varied by declaring that a good title had not been shewn. At the same time the Plaintiff moved for an order on the Defendant to complete the contract by the 15th of August, 1885, and to tender a conveyance four days at least before that date, and, upon delivery of the title deeds, to pay the £3300 4*s.* 4*d.*; but his Lordship held that the application was not made at the proper time, and ordered the motion to stand over till the further consideration.

It appeared that the Defendant had made numerous attempts to evade the judgment for specific performance.

The further consideration and motion now came on together.

Marten, Q.C., and *Alan Stewart*, for the Plaintiff, now applied for an order on minutes prepared in the form given below (1),

(1) The minutes were as follows:—"Let the Plaintiff be at liberty to prepare and execute a conveyance to the Defendant (as an escrow to be delivered to the Defendant, on payment of the purchase-money within the time limited) of the premises comprised in the contract in the pleadings mentioned, such conveyance to be settled by the Judge; and let the Defendant pay to the Plaintiff, at a time and place to be appointed by the Judge, when the said conveyance shall be so approved as aforesaid, the sum of £3300 4*s.* 4*d.* appearing by the Chief Clerk's certificate in this action filed the 21st day of July, 1885, to be the total amount payable by the Defen-

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which they stated had been settled in consultation with the Registrar.

Herbert Foss, for the Defendant:—

This is quite a new form of order, and ought not to be made on further consideration. If your Lordship thinks otherwise, then the motion must have been unnecessary and mere surplusage, and it should be dismissed with costs.

BACON, V.C.:—

Mr. *Foss* says that such an order as this would be a novelty, but he suggests no alternative order. I think it is a very good form of order. I recollect the case and the applications in it, not perhaps in all their details, but sufficiently to know that the Defendant has, by unfair dealings and frivolous applications on his part, baffled the vendor in his efforts to get the contract completed. I was far from thinking the motion surplusage or unnecessary. It was necessary to bring to book this refractory purchaser, and I ordered it to stand over till the further consideration. Many attempts have been made by the Defendant to get rid of his purchase, but all his efforts have failed. In my opinion the Plaintiff is entitled to an order according to the minutes.

The costs, including the costs of the motion, must, according to justice and the procedure of the Court, be paid by the Defendant.

Solicitors: *Talbot & Quayle*, for *Talbot & Wood, Newtown; R. A. Biale.*

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dant to the Plaintiff in respect of the balance of the said purchase-money, with interest and costs up to the 15th day of August, 1885, together with further interest at the rate of £5 per cent. on the sum of £2902 10s. from the said 15th day of August, 1885, to the day so to be appointed as aforesaid (less income tax), the amount to be verified by affidavit, and thereupon let the Plaintiff deliver to the Defendant the said conveyance of the said premises duly executed by him, together with all deeds and writings in his custody or power relating to the said premises.

"Tax the Plaintiff's costs of all proceedings in this action subsequent to the date of the last taxation, including the costs of the motion, and let such costs when taxed be paid by the Defendant to the Plaintiff. Liberty to apply."

G. I. F. C.

BRIDGEND GAS AND WATER COMPANY *v.* DUNRAVEN.

CHITTY, J.
1885
Nov. 3.

[1885 B. 1656.]

Lands Clauses Consolidation Act, 1845, *s.* 9 [*Revised Ed. Statutes, vol. ix., p.* 631]—*Owner under Disability—Valuation—Declaration by Surveyors—Specific Performance.*

On a sale by agreement to a company by an owner under disability:—*Held*, that the requirements of the *Lands Clauses Consolidation Act*, 1845, s. 9, must be strictly complied with, and that the absence of a declaration in writing annexed to the valuation and subscribed by the surveyors was fatal to a claim by the company for the specific performance of the contract, although the valuation was made by surveyors without formal appointment.

SPECIFIC PERFORMANCE.

The Plaintiff company was incorporated by an Act of 1869, with which the *Lands Clauses Act*, 1845, was incorporated.

By an agreement dated the 21st of February, 1872, the Defendant as tenant for life of lands which were in settlement, agreed to sell the same to Plaintiff company for the purposes of their undertaking for £444 10*s*. The company shortly afterwards entered into possession of the land, and on the 23rd of July, 1877, paid the £444 10*s*. into Court under sect. 9 of the *Lands Clauses Act*. The title had been accepted, and a conveyance was tendered and executed, but had not been returned to the company. Delays arose from time to time, and in January, 1883, a dispute arose upon a claim by the Defendant against the company for interest on the purchase-money, and the Defendant's solicitors were pressing for completion and threatened to issue a writ. In March last the Defendant, having been advised that the sufficiency of the price had not been tested by the formal valuation of two surveyors, made and verified as required by sect. 9 of the *Lands Clauses Consolidation Act*, 1845, on a sale by a limited owner, and that until such valuation had been made he could not complete, raised this objection, but stated his willingness to concur with the company in completing the sale, and for that purpose to comply with the requirements of the *Lands Clauses Consolidation Act*, 1845, s. 9, so that he might for

CHITTY, J. 1885 BRIDGEND GAS AND WATER COMPANY v. DUNRAVEN.

the first time be able to give a good title to Plaintiff company by the conveyance already prepared; and he was therefore ready to nominate a surveyor to value.

On the 27th of March, 1885, the company issued a writ claiming specific performance of the agreement of February, 1872, and the Defendant by counterclaim claimed an order on the Plaintiffs to nominate a proper surveyor to value as required by sect. 9 of the *Lands Clauses Consolidation Act*, and, when such valuation had been made, specific performance of the agreement of February, 1872, or (in the alternative) possession of the land and £300 for *mesne* profits.

It appeared that the company were unable to produce any "formal declaration in writing subscribed by" two surveyors and annexed to the valuation, as required by the *Lands Clauses Consolidation Act*, 1845, s. 9, in the case of a purchase "from any party under any disability or incapacity." It was admitted, however, that the valuation was settled by two surveyors, Mr. *Rees* on behalf of the company, and Mr. *Randall* on behalf of the Defendant, but there was no evidence of their formal appointment. A letter of the 27th of October, 1871, by the company's surveyor (Mr. *Rees*) to the company's solicitors was produced, which stated that he and the Defendant's surveyor had met on the previous day and arranged the price and terms at and on which the land was to be purchased by the company, adding that the writer "made notes of the terms in the presence of Mr. *Randall*, and which in part he dictated, and agreed they were right." Mr. *Rees* was now dead, and the notes stated by him to have been made were not produced.

Romer, Q.C., and *J. G. Wood*, for Plaintiff company:—

It will be contended that the requirements of sect. 9 have not been complied with; but, so far as they are essential and not directory only, they have been practically and substantially complied with by the nomination of two surveyors; the provision as to the declaration being annexed to the valuation not being essential, especially having regard to the fact that the valuers concurred in the valuation, and that the company have continued in possession under the agreement of 1872 on the faith of that

valuation. As the company, who are alone interested in requiring formal evidence of the valuation, are satisfied that the price has been properly ascertained, the certificate may be dispensed with: *Dean and Chapter of Ely* v. *Peterborough, Wisbeach, and Sutton Railway Company* (1).

[CHITTY, J., declined to recognise the report of that case as an authority.]

In *Baker* v. *Metropolitan Railway Company* (2) the circumstance that the company had not named any surveyor under the Act to certify that the sum offered was proper and sufficient, was treated by Lord *Romilly* as wholly unnecessary for the purpose of giving validity to the contract. [They also referred to *Wycombe Railway Company* v. *Donnington Hospital* (3).]

Macnaghten, Q.C., and *Onslow*, for the Defendant:—

Wycombe Railway Company v. *Donnington Hospital* is directly in point, and affords a complete answer to the Plaintiffs' case.

No step has been taken to follow the requirements of the Act, either in the nomination of surveyors or in obtaining their certificates. The Defendant called upon the Plaintiffs to comply with the Act, in answer to which demand they issued the writ in this action.

[They were stopped.]

CHITTY, J.:—

The *Lands Clauses Act* does not enable an owner who is under disability to fix the price for the land taken, and it is incumbent on the company to shew that the provisions of sect. 9 have been actually complied with. Now the object of sect. 9 is plain, viz., that the valuation shall not only be made in the manner prescribed, but shall be evidenced in writing, that is, by a declaration in writing or a certificate of the correctness of the valuation subscribed by the surveyors. It is said that the requirements of the section have been pursued in substance if not in form. Passing by the point whether the surveyors were duly nominated in writing under sect. 9, there is no pretence for saying that a

(1) W. N. (1869), p. 201. (2) 31 Beav. 504.
(3) Law Rep. 1 Ch. 268.

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BRIDGEND GAS AND WATER COMPANY v. DUNRAVEN.

declaration in writing was subscribed by the surveyors and annexed to the valuation. Such a declaration is required by the Act, and its absence is fatal to the company's case. This certificate is a document of title for the protection of the company which cannot be dispensed with, the object being that there should be a record duly signed shewing that the price has been properly ascertained, and that all formalities have been duly complied with. But it is said that I ought strictly to divide the section in two parts, and hold that all that is required is that there should be the valuation of two practical surveyors, and that the latter part of the section which requires this declaration to be annexed to the valuation is directory only. I cannot so hold, for that in my opinion would be unnecessarily to sever the section for the purpose of misreading it as a whole.

It is true that in *Baker* v. *Metropolitan Railway Company* (1), Lord *Romilly* appears to have laid no stress upon compliance with the formalities required by sect. 9, but it appears from a note at the end of the report (2), that his decision was to all intents and purposes reversed by Lord *Westbury*, who intimated that in order to enable the tenant for life to give a good statutory title to the company, the Act of Parliament must be strictly pursued. And in *Wycombe Railway Company* v. *Donnington Hospital* (3) Lord Justice *Turner* appears to have looked upon the surveyor's declaration as an essential part of the procedure, and I so hold. The action must be dismissed with costs.

MINUTE OF ORDER:—This action coming on, &c. And it appearing that the price to be paid by the Plaintiff company in respect of the purchase in the pleadings mentioned, has not been ascertained and settled in due conformity with the provisions of the *Lands Clauses Consolidation Act*, 1845, and that the agreement in the pleadings mentioned has not become final and complete, and ought not to be specifically performed;—Dismiss the action with costs. Counterclaim also dismissed, but without costs.

Solicitors: *I. H. Wrentmore*, agents for *T. T. Lewis, Bridgend; Frere, Forster & Co.*

(1) 31 Beav. 504. (2) 31 Beav. 511.
(3) Law Rep. 1 Ch. 268.

F. G. A. W.

In re LONDON AND SOUTHERN COUNTIES FREEHOLD LAND COMPANY.

CHITTY, J.

1885

Dec. 4.

Company—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *Sched.* 1, *Table A. arts.* 52, 53 [*Revised Ed. Statutes, vol. xiv., p.* 256)—*Subscribers of Memorandum of Association—Power of—Appointment of Directors—Quorum.*

The articles of association of a company followed Table A of the *Companies Act*, 1862; clauses 52 and 53 of that table being to the effect that the number of directors shall be determined by the subscribers of the memorandum of association, and that until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors. There was also a special article that the number of directors should not be less than three nor more than ten, and that two should form a quorum.

Directors were appointed at a meeting attended by two only of the subscribers of the memorandum of association:—

Held, that the special article only applied when the directors had been duly appointed, and that, the directors having been appointed at a meeting consisting of a minority of the subscribers of the memorandum of association, the appointment was invalid.

Howbeach Coal Company v. *Teague* (1) held not to have been impugned by *York Tramways Company* v. *Willows* (2).

MOTION.

The company was formed for the purpose of purchasing certain property from a Mr. *Ellis*, the promoter of the company.

The memorandum of association was signed by seven persons, of whom *Ellis* was one.

The articles of association provided that the regulations of Table A. of the *Companies Act*, 1862, should apply except so far as they might be varied by the articles.

Article 52 of Table A is as follows: "The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association."

Article 53 is as follows: "Until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors."

By article 3 of the articles of association it was provided that "the number of directors of the company shall be not less than

(1) 5 H. & N. 151. (2) 8 Q. B. D. 685.

CHITTY, J. 1885 *In re* LONDON AND SOUTHERN COUNTIES FREEHOLD LAND COMPANY

three nor more than ten unless otherwise determined by the company in general meeting, and two directors shall form a quorum."

Mr. *Bentinck* applied for shares in the company upon the condition that he was appointed a director.

A meeting of the subscribers of the memorandum of association was called by Mr. *Ellis* sending to each of the signatories a letter in the following terms:—

"*London and Southern Counties Freehold Land Company, Limited.*

"Dear Sir,—A meeting of the subscribers of the above will be held here at one o'clock on Wednesday, 13th May (to-morrow), when I shall be glad if you can make it convenient to attend.

"Yours faithfully,

"*T. M. Ellis.*"

The meeting thus summoned was attended by two only of the subscribers of the memorandum of association, of whom *Ellis* was one, and they proceeded to allot shares to Mr. *Bentinck*, and appointed him a director.

This was a motion in the winding-up of the company by *Bentinck* to rectify the register of shareholders of the company by striking out his name, and the question was whether, under the circumstances, a minority of the subscribers of the memorandum of association had power to allot shares or appoint directors.

Macnaghten, Q.C., and *Bramwell Davis*, in support of the motion:—

Mr. *Bentinck's* application was conditional on his being appointed a director of the company, and we say his appointment as a director was invalid, as he was appointed by a minority only of the subscribers of the memorandum of association, and on the authority of *Howbeach Coal Company* v. *Teague* (1) such an appointment is bad.

Bagnold, for the liquidator:—

The case relied upon by the other side has been questioned by the present Master of the Rolls in *York Tramways Company* v. *Willows* (2), where he says he is unable to agree with it.

(1) 5 H. & N. 151. (2) 8 Q. B. D. 685.

CHITTY, J. (after stating the facts, proceeded) :—

I am of opinion that article 3 of the articles of association of this company only applies when the directors have been properly constituted, and not to such as by clause 53 of Table A of the *Companies Act*, 1862, are "deemed to be directors." It has been held in the case of *Howbeach Coal Company* v. *Teague* (1), on the construction of similar articles of association, that a meeting of less than a majority of the subscribers of the memorandum of association is unable to appoint directors. It has, however, been suggested in the course of the argument that the judgment of Lord Justice *Brett*, in the case of *York Tramways Company* v. *Willows* (2), throws a doubt on the decision in *Howbeach Coal Company* v. *Teague*, but I do not think the present Master of the Rolls intended to throw any doubt upon that case.

It seems to me that there must be a majority of the subscribers of the articles of association to determine who are to be the directors of the company and to adopt the contract with the promoter. It would be monstrous to allow two persons holding only nominal interests in a company to determine questions of vital importance to the company.

In this case there was no mention in the notice sent by *Ellis* to the subscribers of the memorandum convening the meeting of the nature of the business intended to be transacted at the meeting, although it was of such great importance, and I am not prepared to hold that such a notice was sufficient under any circumstances to enable the subscribers attending the meeting to determine such an important question as the appointment of directors. The order will be in the terms of the notice of motion.

Solicitors : *Cunliffes & Davenport; Appleyard.*

(1) 5 H. & N. 151. (2) 8 Q. B. D. 685.

G. M.

PEARSON, J. 1885 Nov. 26.

In re UNDERBANK MILLS COTTON SPINNING AND MANUFACTURING COMPANY.

Limited Company—Register of Mortgages—Mortgage to Director—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 43 [*Revised Ed. Statutes, vol. xiv., p.* 212.]

In 1874 a limited company mortgaged their property to a partnership consisting of three persons, of whom two were directors of the company. The mortgage was made for a term of seven years. It was not registered as required by sect. 43 of the *Companies Act*, 1862. In 1876 the partner who was not a director assigned his interest in the mortgage to the other two. In 1881 it was arranged that the mortgage should be continued for another seven years. The directors having been then informed that the mortgage ought to be registered, the secretary entered the particulars required by sect. 43 on a blank page in the company's register of transfers, altering the headings accordingly. The book in which the entries were made was marked on the outside "Register of Transfers." No other mortgage was ever made by the company, and the secretary deposed that no one had ever inquired for the register of mortgages.

The company being in liquidation:—

Held, that there had been a sufficient registration of the mortgage in compliance with sect. 43, and that the mortgagees were entitled to enforce their mortgage.

Held, also, that debts contracted by the company during the seven years between the execution and the registration of the mortgage were not entitled to priority over the mortgage debt.

Held also, that, even if the registration was ineffectual, inasmuch as one of the original mortgagees was not a director of the company the mortgage was not invalidated, and that it remained valid in the hands of the two directors after the assignment to them of the interest of the third mortgagee.

ADJOURNED SUMMONS raising a question as to the validity of the registration of a mortgage executed by the company.

The company was, on the 25th of March, 1874, registered under the *Companies Acts*, 1862 and 1867, as a company limited by shares. On the 6th of June, 1874, the company executed in favour of *John Butterworth*, *David Butterworth*, and *Richard Butterworth*, who were then carrying on business in partnership as cotton

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spinners and manufacturers under the firm of *John Butterworth & Sons*, a mortgage of the company's mills, cottages, engines, machinery, and other property, to secure the payment of the sum of £13,500 with interest. The deed contained a provision for the continuance of the loan for the term of seven years from the date of the deed. At the time of the execution of the deed *John Butterworth* and *Richard Butterworth* were directors of the company. *David Butterworth* never was either a director or an officer of the company. By a deed dated the 22nd of April, 1876, *David Butterworth* assigned his undivided one-third share in the principal sum of £13,500 and the interest thereon to *John Butterworth* and *Richard Butterworth*, their executors, administrators, and assigns, and the share of *David Butterworth* in the mortgaged property was also assigned by him to *John Butterworth* and *Richard Butterworth*, their executors, administrators, and assigns. *John* and *Richard Butterworth* afterwards sub-mortgaged their security to *John Hamer* to secure £6000 and interest. *John Butterworth* died on the 13th of October, 1883, and an action was afterwards brought to administer his estate. On the 2nd of August, 1884, an order was made by *Pearson*, J., to continue under the supervision of the Court the voluntary winding-up which the company had previously resolved on.

The mortgage of the 6th of June, 1874, was not registered as required by sect. 43 of the *Companies Act*, 1862, until the year 1881. In that year the term of seven years for which the loan was to be continued expired, and the mortgagees then arranged with the directors of the company for an extension of the term for another seven years. At a meeting of the board held at this time one of the directors drew the attention of his co-directors to the fact that the company was bound to keep a register of mortgages, and in consequence of this the secretary of the company on the following day made certain entries in the register of transfers of shares which was kept by the company. This book had on the outside of it printed the name of the company and the words "Register of Transfers." The pages of the book were headed "Register of Transfers." On a blank page near the end of the book the secretary struck through the word "transfers"

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and inserted the word "mortgages," and made the following entries:—

	A short description of the property mortgaged by the company.	Amount of mortgage or charge created by the company.	Names of the mortgagees entitled to such charges.
1875 June 6.	Mill buildings, office, shed, weft and new warehouses, size house, and stables, coach-house, engine and boiler houses, forty-five cottages and all buildings on the premises.	£12,000	*John Butterworth, David Butterworth, Richard Butterworth*, partners, trading as and in the name of Messrs. *John Butterworth & Sons, Whitworth, Rochdale.*
1875 June 6.	Twenty cottages	£1,500	*John Butterworth, David Butterworth, Richard Butterworth*, partners, trading as and in the name of Messrs. *John Butterworth & Sons, Whitworth, Rochdale.*

In the fourth column the address of each of the mortgagees was also given.

It was admitted that the company had never executed any mortgage of their property but the mortgage of the 6th of June, 1874. *John Butterworth* and *Richard Butterworth* were both directors of the company in 1881 when the term of the loan was extended and the above entries were made.

The former secretary of the company made an affidavit in which he said that, at the time when he made the entries, he had not any copy of the mortgage to refer to, but he knew that the original arrangement between the mortgagees and the company was for a loan of £12,000, to be secured on all the property of the company, but that the company expressed a wish to reserve twenty cottages from the security, so as to have them available for security should any further money be required, to which the mortgagees objected, saying that they would prefer to increase their loan, and, as he understood, lend the additional sum of £1500 on the security of those cottages. He said that he was not aware, and had only learnt during the year 1885, that the total amount of

£13,500 was secured as an entire sum on the whole property of the company, including the twenty cottages, and he made the entries according to his then knowledge of the facts and his recollection of the original arrangement. He said that the error in the entries of "1875" for "1874" was simply a clerical mistake. He also stated that, during the whole time that he was secretary of the company, no inquiry was ever made by either a shareholder or a creditor for the register of mortgages.

After the commencement of the winding-up the liquidators carried on the business of the company. They refused to pay the interest which became due on the mortgage, on the ground that the mortgage had not been validly registered in compliance with sect. 43.

The receivers who had been appointed in the action to administer the estate of *John Butterworth* took out a summons in the winding-up, asking that the liquidators might be ordered to pay them a moiety of the half-year's interest which became due upon the mortgage on the 1st of May, 1885. A similar summons was taken out by *Richard Butterworth* as to the other moiety of the interest.

Higgins, Q.C., and *Hadley*, for the first summons:—

The provisions of sect. 43 as to registration have been in substance complied with. It is not necessary that the register of mortgages should be kept in a separate book. The slight inaccuracies in the entries do not affect the validity of the registration: *Weikersheim's Case* (1). The directors acted with perfect *bona fides*. The question of validity arises only as between the mortgagees and the company; there is no competition with other mortgagees as to priority, for this is the only mortgage ever executed by the company. The rule laid down in *Ex parte Valpy and Chaplin* (2), that an officer of a company, who has not taken care to have a mortgage to himself by the company registered, cannot avail himself of the mortgage when the company is being wound up, does not apply to a mortgage made to several partners, some only of whom are directors of the company: *Smith's Case* (3).

(1) Law Rep. 8 Ch. 831. (2) Law Rep. 7 Ch. 289.
(3) 11 Ch. D. 579.

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The validity of the sub-mortgage, at any rate, is unaffected, the sub-mortgagee not being an officer of the company: *In re International Pulp and Paper Company* (1). In the case of a mortgage by a company to one of its own shareholders, the validity of the mortgage would not be affected by its non-registration, the shareholder not being an officer of the company: *In re General South American Company* (2). Again, the validity of a mortgage to a director is not affected by its non-registration, unless the director knowingly and wilfully omitted to have it registered. The omission in the present case was due to ignorance. No one has been injured by the omission to register, for no one has ever inquired for the register of mortgages. If anyone had inquired for the company's register of mortgages, these entries would have been shewn to him. If the mortgage was originally valid by reason of one of the mortgagees not being an officer of the company, it could not be subsequently rendered invalid by the transfer of that mortgagee's interest in the mortgage to his co-mortgagees.

F. B. Palmer, for the second summons.

Morshead, for the sub-mortgagee.

L. Ryland, for the liquidators of the company:—

There has been no valid registration of the mortgage. A separate book ought to be kept for the purpose, and there should be something on the outside of the book to indicate that it is a register of mortgages. If the argument against me is right, it would be sufficient to keep the register on loose sheets of paper.

Again, if the form of registration is sufficient, the actual entries are so incorrect as to make the registration worthless.

Moreover, it is not sufficient to make the registration seven years after the date of the mortgage. In that interval the company contracted debts to a large amount. Those debts, at any rate, are entitled to priority over the mortgage debt. *Smith's Case* (3) does not apply. The circumstances of that case were very different from those of the present case.

(1) 6 Ch. D. 556. (2) 2 Ch. D. 337.
(3) 11 Ch. D. 579.

PEARSON, J. (after stating the facts, continued):—

It is plain to me that the secretary of the company made the entries in the book which was called a Register of Transfers of Shares, intending thereby to comply with the requirements of sect. 43, and this was done the day after the agreement was come to for extending the term for the payment of the mortgage debt. It is now said by the liquidators that this book was not a register of mortgages, because on the outside of the book there was not a word to shew that it was a register of mortgages. On the outside of the book there was printed the name of the company, and the words "Register of Transfers." To my mind this does not prevent the book from being a register of mortgages. It is not suggested that any evasion of the Act was intended, or that there was any attempt to defraud. I think I should be going not only beyond the Act, but beyond what the most ordinary common sense would suggest, if I were to say that the registration could not be valid unless it was made in a separate volume, although it was a separate register of mortgages in the same volume with the register of transfers of shares. To my mind the Act does not require that the registration of mortgages shall be made in a separate volume. I do not see how anyone who came to inquire for the register of mortgages would have been deceived, because the book either had no title on the outside or had a wrong title. If any person had wanted to see the register of mortgages, he would have asked for it, and, if he had done so, the page containing these entries would have been shewn to him. If there had been evidence that any creditor of the company had inquired for the register of mortgages, and had been told that there was none, I should have regarded the case very differently. Looking at the matter in the strictest possible way, I think there has been a sufficient compliance with sect. 43 as to the form of the registration.

The next objection is that the entries are incorrect in fact. In substance I think they are correct. They state (no doubt erroneously) that there were two mortgages upon the two parts of the property of the company (which together made up the whole property) for two sums respectively of £12,000 and £1500. In fact there was one mortgage of the whole property for £13,500. I think I should be going too far if, when the truth was thus in

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substance told, and the secretary states that the error arose from a defect in his memory, I were to hold that this error makes the registration void. I do not mean to say that if, by reason of the error, a question as to priority had arisen between different mortgagees, the error might not have been a matter of great importance. But I am dealing with a case in which there is only one mortgage, and under the circumstances I am of opinion that there has been a good registration of the mortgage.

It is said that, as the registration was not made till the year 1881, the mortgage can only date as from that time, and that any debts contracted by the company between the date of the mortgage and the date of the registration are entitled to priority over the mortgage debt. If a new mortgage had been given in 1881 to a stranger it must be admitted that it would have had priority over any then existing unsecured debts of the company. And, looking at the circumstances, I think that this mortgage is as much entitled to priority as it would have been if it had been executed the day before the entries were made by the secretary in the company's books. An agreement was then come to to extend the term of the loan, and the mortgage then became in substance a new mortgage of that date, and I can see no reason for not giving it the same priority as it would have had if it had been in fact a new mortgage then executed. In my opinion, therefore, all the objections which have been taken to the validity of the registration fail.

Another ground for upholding the validity of the mortgage would be this, that at the time when it was executed *David Butterworth* was not a director or an officer of the company. In *Smith's Case* (1) it was held by the Court of Appeal that, when a mortgage made by a company to a partnership firm was not registered, only one of the partners being a director of the company, the mortgage was valid *in toto*. *Jessel*, M.R., said (2): "There is one other observation which I should like to make about the position of a partnership. It was very much pressed upon us that a man could not by taking partners rid himself of a liability, but I think the answer to that is very simple. In the present case you can determine in what character the act was

(1) 11 Ch. D. 579. (2) 11 Ch. D. 591.

done. Mr. *Taylor Smith*, we will assume for this purpose, effected the loan, or rather took the security for the loan, which had been previously made on behalf of his firm. His action as agent for the firm, or as managing partner, ceases when the security is effected. The registration is the duty of the company, the neglect to register is by an officer of the company, and therefore the wrongful omission to register, which is what involves the personal disqualification, would be the act of Mr. *Taylor Smith* as an officer of the company. You can, therefore, see that it was not as a partner of his firm, but as a managing partner or director of his company, that he was guilty of the omission." In the present case it may be said that *David Butterworth* was not guilty of any omission; *John* and *Richard Butterworth* were guilty of an omission, but only in their character of directors of the company, and the objection arising out of that omission applies to them alone. I am glad to find that the Court of Appeal has not carried the doctrine of the earlier cases on this subject any further, and I do not desire to extend it to any state of circumstances which is not covered by previous decisions.

Solicitors: *Carter & Church; Radford & Frankland; T. Russel Kent; Clarke, Woodcock, & Ryland.*

W. L. C.

PEARSON, J.

1885

Nov. 28.

DRUITT *v.* SEAWARD.

[1884 D. 928.]

In re AINSWORTH.
AINSWORTH *v.* SEAWARD.

[1885 A. 217.]

Settlement—Construction—Ultimate Limitation to Next of Kin of Wife—Time for ascertaining Next of Kin entitled.

A testator by his will directed that the shares of his daughters in his residuary estate should be settled, the ultimate limitation, in case a daughter should not leave any child or children who should be living at the decease of the survivor of herself and her husband, being in trust for the person or persons who under the *Statutes of Distribution* "would on her decease have been entitled thereto in case she having survived her husband and had then died possessed thereof and intestate." A daughter having died without issue, leaving her husband surviving:—

Held, that her next of kin to take under the ultimate limitation were to be ascertained at the time of her own death, and not at the time of the death of her husband.

Chalmers v. *North* (1) disapproved.

UNDER the ultimate limitations contained in the settlement, dated the 28th of May, 1837, made on the marriage of Mr. and Mrs. *Mayo*, and in the events which happened, *John Ainsworth* (the elder) became, upon the death of Mrs. *Mayo*, on the 11th of April, 1858, entitled, as her sole next of kin living at her death, to the capital of the funds which were vested in the trustees of the settlement, subject to the life estate therein of *Thomas Mayo*, the husband. *Thomas Mayo* died on the 23rd of April, 1884. *John Ainsworth* (the elder) died in 1861, having by his will, dated the 1st of June, 1858, bequeathed the residue of his personal estate to his trustees, upon trust for conversion, and after payment of his debts, &c., to stand possessed of the proceeds upon trust to pay an annuity to his wife during her life, and, subject to the trusts aforesaid, the trust moneys were to be in trust for all such one or more of his five children, *John Ainsworth*, *James Ainsworth*, *Anne Humby*, *Elizabeth Cusse*, and *Charlotte Maton*, who should be living at his decease, and the issue of any of them who should die in his

(1) 28 Beav. 175.

lifetime, and who being male should attain twenty-one years, or being female should attain that age or marry. And the testator directed that the shares of each of his said daughters should be held by his trustees, upon trust to pay the income thereof respectively to such daughters during their lives, and after the decease of such daughters the trustees should pay the income of their respective shares to their respective husbands during their lives, and after the decease of each of them his said daughters and her said husband, then, as to her share of the trust estate, in trust for her children as therein mentioned, and, in case such daughter should not leave any child or children who should be living at the decease of the survivor of such daughter and her husband, then the share of such daughter in the trust estate should be "in trust for such person or persons who, under or by virtue of the statutes made for the distribution of estates of intestates, would on her decease have been entitled thereto in case she having survived her husband and had then died possessed thereof and intestate, and such persons, if more than one, to take in the shares and proportions in which the same would be divisible by virtue of the same statutes." All the testator's five children survived him. His widow died on the 21st of March, 1879. *John Ainsworth* (the son) died on the 27th of October, 1864, without issue. The testator's daughter *Charlotte Maton* died on the 14th of September, 1871, without having had any issue. *Hugh Maton*, her husband, died on the 22nd of April, 1885.

The action of *Druitt* v. *Seaward* was brought by *James Druitt*, the surviving trustee of the settlement of the 28th of May, 1837, against *Stephen Seaward*, the executor of *John Ainsworth* (the elder), to execute the trusts of the settlement. In that action the funds subject to the trusts of the settlement were transferred into Court.

The second action was brought to execute the trusts of the will of *John Ainsworth* (the elder) in relation to the funds to which he became entitled as the next of kin of Mrs. *Mayo*.

This petition was presented in both actions, by Mrs. *Humby* and *Lydia Lucy Ainsworth* (who claimed by assignment from *James Ainsworth*) for the division of the fund in Court.

The main question was, at what time, under the trusts of the will of *John Ainsworth* (the elder), the next of kin of Mrs. *Maton* (who

PEARSON, J. were to take under the ultimate limitation of her share) were to be ascertained—at her own death, or at the death of her husband.

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DRUITT v. SEAWARD.

In re AINSWORTH.

AINSWORTH v. SEAWARD.

At the time of Mrs. *Maton's* death her statutory next of kin were her mother, her brother *James Ainsworth*, and her sisters, Mrs. *Humby* and Mrs. *Cusse*.

At the time of *Hugh Maton's* death the statutory next of kin of Mrs. *Maton* were *James Ainsworth*, Mrs. *Humby*, and Mrs. *Cusse*.

Mrs. *Humby* was the legal personal representative of her mother.

Vernon R. Smith, for the Petitioners.

Rowden, for the next of kin of Mrs. *Maton* living at the death of her husband:—

The words "had then died" in the ultimate trust shew that the death of the husband is the period contemplated, and that the next of kin are to be ascertained at that time: *Chalmers* v. *North* (1); *Pinder* v. *Pinder* (2). The testator may have wished to exclude any question of representation.

[PEARSON, J.:—The word "and" must be struck out from "and had then died."]

Speed, Q.C.; *Oswald*; *Bramwell Davis*; *John Mercer*; and *M. J. Druitt*, for other parties.

PEARSON, J.:—

I do not mean to say that *Chalmers* v. *North* was not rightly decided; the words of the will there were different from those of the present will. But I cannot agree with the reasoning of Lord *Romilly*, M.R. The real object of these limitations is to exclude the husband. The question is whether it was also intended to postpone the period for ascertaining the wife's next of kin until his death. The clause says "in trust for such person or persons who . . . would on her decease have been entitled thereto." It is plain that that must mean "at the very moment of her decease." And it seems to me that the word "then" which follows must also mean the time when she did actually die. I think the clause

(1) 28 Beav. 175. (2) 28 Beav. 44.

ought to be read, "if at the moment when she did actually die she had survived her husband and had then died possessed thereof intestate." I am of opinion, therefore, that the wife's share goes to her next of kin living at her own death.

Solicitors: *Lovell, Son, & Pitfield; Taylor, Hoare, & Co.; Clarke, Rawlins, & Co.; Hancock & Co.*

W. L. C.

HUTCHINSON *v.* NORWOOD.

[1878 H. 14.]

Infant—Next Friend—Testamentary Guardian.

A father authorized a stranger to act as next friend to his infant children: he died, having by will appointed his wife, their mother, guardian of his children:—

Held, that the mother had the right to remove the next friend and be substituted in his place.

THIS was an action for the administration of the estate of *John Hutchinson*, a testator, who died in March, 1865. The testator devised his real estate to the three Defendants, his executors, on trust for his eldest son, *John Hutchinson*, for life, with remainder to the first and other sons of *John Hutchinson*, the son, in tail male, with remainder to the first and other sons of *John Hutchinson*, the son, in tail, with remainder to the daughters of *John Hutchinson*, the son, as tenants in common in tail with cross-remainders.

The Plaintiffs were the five infant daughters, the only children of *John Hutchinson*, the son, living, suing by *John Faddick King*, their next friend. The writ was issued on the 9th of January, 1878. The next friend was a clerk of the solicitors of *John Hutchinson*, the younger, and had undertaken the office at his request. *John Hutchinson*, the son, died on the 3rd of May, 1885, having made a will by which he appointed his wife, *Teresa Mary Hutchinson*, sole guardian of his children. This was a summons on the part of the Plaintiffs by *Teresa Mary Hutchinson*, their mother, their next friend, for the purpose of the application that *John Faddick King*,

PEARSON, J. 1885 HUTCHINSON v. NORWOOD.

the next friend, might be removed, and *Teresa Mary Hutchinson* approved as next friend in lieu of him.

Cozens-Hardy, Q.C., and *Stallard*, for the summons:—

The testamentary guardian is in the same position as the father was himself during his lifetime as regards the children; she has therefore a right to be substituted for the present next friend; though he acted properly originally in taking upon himself the office, and has conducted the proceedings properly in the interest of the children: *Woolf* v. *Pemberton* (1). There is no objection to his being allowed all his costs, including the costs of this application.

Cookson, Q.C., and *Grosvenor Woods*, for the next friend:—

It was competent to the father to choose who should be next friend. The Court after his death will respect the wish of the father in this respect. In *Woolf* v. *Pemberton* the next friend had improperly brought the action in the first instance behind the back of the father. There is no reason because the next friend is a solicitor's clerk to displace him: *Lloyd* v. *Davies* (2).

PEARSON, J.:—

I am sorry that such an application as this should have to be made. The father of the Plaintiffs allowed an action to be instituted by *King* in order to administer a very large estate, of which he was tenant for life, but in which he had disposed of all his life-interest, and to which estate his children were contingently entitled.

Not a word is said as to the action being improper, or as to the next friend not having done his duty. The father died, having appointed his wife, as he had a right to do, testamentary guardian. The wife thereupon stood in the place of her husband with regard to the proper course for her to take as guardian. She says, and says not unreasonably, that although her husband was unwilling or unable, she is both willing and able to undertake that office, and she asks *King* to retire from that office and allow her to be substituted. What Sir *George Jessel* says in the case of *Woolf*

(1) 6 Ch. D. 19. (2) 10 Jur. (N.S.) 1041.

v. *Pemberton* (1) as to the next friend is applicable to *King* in this case. I notice that he does not put the case upon any impropriety in the next friend acting as such, but upon the father's right. I think a testamentary guardian is in exactly the same position. A new state of things has arisen. She asks to be appointed to be next friend: I think she ought to be. *King* having properly conducted himself, all his costs must be allowed. The same order will be made as in *Woolf* v. *Pemberton*. *King's* costs will include the costs of this application, though I have some doubt whether I ought to give them.

Solicitors: *W. S. James; G. S. & H. Brandon.*

D. P.

In re YOUNGS.
DOGGETT *v.* REVETT.

[1885 Y. 135.]

Practice—Non-payment of Costs—Stay of Proceedings.

Where a party prosecuting proceedings is in contempt for not paying costs, the proceedings will be stayed.

THIS was an action by Mrs. *Doggett* against *Benjamin K. Revett* for the administration of the personal estate of *Sarah Youngs*, deceased. On the 6th of August, 1885, an order was made in this action and in an action of *Vollum* v. *Revett* (2) dismissing an appeal by the Plaintiff, Mrs. *Doggett*, with costs. The costs of the Defendant were certified by the Taxing Master at £40 11*s.* 10*d.* They had not been paid. This was a summons for a stay of all further proceedings in the cause as against the Defendant until the sum of £40 11*s.* 10*d.*, the amount of taxed costs payable under the order of the 6th of August, 1885, should have been paid.

Everitt, Q.C., and *Herbert Foss*, for the summons:—

The old practice of the Court of Chancery was that when a party was in contempt in not having paid costs ordered to be

(1) 6 Ch. D. 19. (2) 30 Ch. D. 421.

PEARSON, J. 1885 *In re* YOUNGS. DOGGETT *v.* REVETT.

paid, any proceedings that the party in contempt was prosecuting should be stayed: *Wilson* v. *Bates* (1); *Bradbury* v. *Shawe* (2); *White* v. *Bromige* (3); *Seton* on Decrees (4). In the absence of a special rule the old practice continues: Order LXXII., rule 2.

[PEARSON, J., referred to *Reeve* v. *Hodson* (5).]

Bradford, for the Plaintiff:—

The practice in the Common Law and Chancery Divisions is founded on the same principle. In neither Division will a party be prevented from prosecuting proceedings simply because he has not paid costs: *Morton* v. *Palmer* (6).

PEARSON, J.:—

Mr. *Bradford's* argument is founded on a fallacy. I think it would surprise the Judges of the Queen's Bench Division to be told that any rule laid down in respect of the costs of a new trial was to bind the Judges in the Chancery Division, as much as it would surprise me if I were told that my judgment was to bind the Judges in the Queen's Bench on an application for a new trial. On an application for a new trial the Court imposes what terms it likes. And so I understand Mr. Justice *Mathew*. In the case cited by Mr. *Bradford* he says this (7): "There is a question to be considered here, viz., whether the Court of Appeal could have contemplated such a condition when they made the order. There is no such condition imposed in terms by the order, and I think that it was made with reference to the procedure of the Common Law Courts. I think the Master had no right to interpolate a condition which the Judges of the Court of Appeal did not impose." All that Mr. Justice *Mathew* says is, that the Court of Appeal, when it granted a new trial, might have imposed a condition; but it did not, and it was not there the duty of the Master to add a condition which the Court of Appeal had not imposed.

This is simply a question as to the old practice, which has

(1) 3 My. & Cr. 197.
(2) 14 Jur. 1042.
(3) 26 W. R. 312.
(4) 4th Ed. p. 1539.
(5) 10 Hare, App. xli.
(6) 9 Q. B. D. 89.
(7) 9 Q. B. D. 91.

not been shewn to be altered in any way by any new statute or order.

If counsel for the Plaintiff will now tell me that within a reasonable time the £40 11*s.* 10*d.* will be paid, I will stay the order till that time.

The application may stand over for a fortnight, the Plaintiff to take no step in the action in the meanwhile.

Solicitors: *Royle & Co.; W. H. Roberts.*

D. P.

OTTO *v.* STEEL.

[1884 O. 145.]

Patent—Prior Publication—Foreign Treatise—Public Library—British Museum.

A French treatise was placed in the *British Museum* library in 1863. The museum catalogue is kept with reference to authors' names; books are arranged according to subject matter; readers can under guidance search for books on particular subjects:—

Held, there was no prior publication in *England* of matter contained in the treatise, so as to avoid a patent taken out in 1876.

THIS was an action to restrain the infringement of a patent granted in the year 1876 for improvements in gas motor engines. The defence of want of novelty was set up. One of the particulars of objections delivered by the Defendant to the validity of the patent was "*Nouvelles Recherches sur les conditions pratiques de plus grande utilization de la chaleur, et en general de la force motive, par Alph. Beau de Rochas.* Published in 1862, pages 28 to 35." That treatise was published in *Paris.* One copy only was proved to have been in *England* prior to 1876. It was bought for the *British Museum* in the year 1863. It was catalogued in 1864; it was then assigned to its proper place in the library among books considered to relate to the same subject, where it has been kept ever since.

Except so far as is stated below, readers have no access to any part of the library of the *British Museum* beyond the reading-room. They have access to the general catalogue and to books of reference kept in the reading-room.

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In the general catalogue of the *British Museum* the printed books are referred to under the names of their authors. Accordingly the treatise in question was entered in the catalogue under the name *Beau de Rochas*, and in no other place. The book was catalogued also under the name of the author, and in no other way, in *Lorenz'* "*Catalogue Générale de la Libraire Française*," published in 1867. There was evidence that *Lorenz'* catalogue was much used in the trade, that a copy was among the books of reference in the reading-room of the *British Museum*, to which readers have direct access, and that other copies were in other public libraries.

Frederick Justin, a French bookseller of *Soho Square*, gave evidence that in the early part of 1863 he purchased a number of copies of *Reinhard's* annual trade catalogue of books published in *Paris* during the year 1862. The treatise which it was sought to put in was referred to in that catalogue under the title "*Physique*," as well as under the author's name. The witness believed he took one hundred copies; he was certain he did not take less than twenty-five. He said they were used to circulate among libraries and other customers; most of them were given away, some were sold. He produced a copy that had been retained for his own use.

George Bullen, keeper of the printed books in the *British Museum*, formerly superintendent of the reading-room, gave evidence that it is the duty of the superintendent to assist readers in obtaining works to consult on any particular subject; if information is required by a reader as to what books there are in the library on a particular subject, and he cannot from personal knowledge give the required information, it is customary to send an assistant in charge of the reader to the press and shelves where it is supposed books on that subject are likely to be, and let the reader see for himself what books there are, and that the books are arranged in the different parts of the library according to their subject.

Aston, Q.C. (Sir *R. E. Webster*, A.G., *Hemming*, Q.C., *Davey*, Q.C., and *W. N. Lawson*, with him), for the Plaintiff:—

The contents of the treatise of *Beau de Rochas* had in no way,

till it was discovered for the purpose of these proceedings, been published in *England*. No one in *England* has been shewn to have read any part of it; no one acquainted with the subject has been shewn to have known the name of the author. The only copy in *England* was in a library of general character, of immense extent, in a part of the library not accessible to readers; it was not as if it had been in the *Patent Library*, or other technical library, where an inventor would naturally go for information. The book was not catalogued in such manner that a person seeking information on the subject would be likely to find it. Nor was there any other mode by which he would be likely to discover it: *Plimpton* v. *Malcolmson* (1); *United Telephone Company* v. *Harrison, Cox-Walker, & Co.* (2).

Moulton, Q.C. (*J. C. Graham*, with him), for the Defendant:—

The evidence shews that *Beau de Rochas* must have been an author of repute in *England;* his book was known to the authorities of the *British Museum*, and when put on the shelves of that library was in the place of all others most accessible to the public; it thereupon became part of the common stock of knowledge of Englishmen: *Lang* v. *Gisborne* (3).

Sir *R. E. Webster*, in reply.

PEARSON, J.:—

I feel myself unable to accept this book. The question is whether or not this book has been published in this country in such a way as to become part of the public stock of knowledge in this country. It is not, to my mind, necessary for that purpose to shew that it has been read by a great many people, or that any person in particular has got from it the exact information which it is said would have enabled Dr. *Otto* in this case to have made his engine. But to my mind it must be published in such a way as that there may be a reasonable probability that any person, and amongst such persons Dr. *Otto*, might have obtained that knowledge from it.

(1) 3 Ch. D. 531. (2) 21 Ch. D. 720.
(3) 31 Beav. 133.

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Now, the only evidence that I have in this case of this book is this: There is one copy proved to be in this country in the *British Museum*. There is no evidence before me that any other copy of this work has been imported into this country. In the *British Museum* it is not in the reading-room; it is in the inner room of the *British Museum*, and can only be obtained by one of two means, either by some person knowing of the book and writing the name of the book on a piece of paper, and requesting that the book may be furnished to him; or, according to the evidence that we have had to-day, if a reader, wanting to find something on a particular subject, goes to the superintendent, asks what books there are that he had better read, the superintendent, if not able to give him the information, will direct one of his assistants to take him to that section of the library where such books are likely to be found, and will desire him to let the reader look over the titles of those books, and select what book he pleases out of that section of the library. With regard to this particular book, the further evidence given was this: It was catalogued in the *British Museum* under the name of the author, and under the name of the author only. It was catalogued in one French catalogue, *Lorenz'*, under the name of the author only. It is catalogued in the French catalogue which was produced to me this morning, M. *Reinhard's*, not only under the name of the author, but in a catalogue at the end of subjects, under the title of "*Physique*." With regard to the first catalogue it would tell any person who was not acquainted with M. *Beau de Rochas* nothing but that M. *Beau de Rochas* had written this particular book, and if he were in search of a book upon this subject he would not be enabled to find it by means of the catalogue in any other way than by reading through the catalogue until he came to the name of M. *Beau de Rochas*, when he would find that M. *Beau de Rochas* had written this book, the title of which is in *Lorenz'* catalogue. This is the only way in which it would convey any information to him. With regard to the second catalogue, Mr. *Justin*, who is now either the only person in the well-known firm in *Soho Square* or a partner in that firm, says he took in that work; that in the year 1863 he received this particular volume, which contains a catalogue of books published in 1862, and that

he certainly must have taken twenty-five copies, and thinks it probable that he took 100 copies. Keeping one or more copies for himself—one certainly—he says he disposed of the others by presenting them to libraries and to customers of his own in order that he might obtain thereby a larger sale for books; in the hope, I presume, that some of the books mentioned in that work so circulated by him would be ordered through himself. Curiously enough he does not go on to say that *Beau de Rochas'* book was ordered by a single library or customer. I think, therefore, the evidence is not carried much further than it was by *Lorenz'* catalogue so far as regards knowledge of the work in this country, and certainly it is a curious thing to find that a book which is said to contain an anticipation of a remarkable part of Dr. *Otto's* patent, is at all events so unknown in this country that it cannot be proved before me that a single copy has ever entered this country except the one single copy which is at the present moment on the shelves of the *British Museum*.

Now, with regard to that fact, I confess there is this difficulty. In *Plimpton* v. *Malcolmson* (1) Sir *George Jessel*, in commenting upon *Heurteloup's Patent* (2), says this in reference to a book relied on in *Heurteloup's Patent* as an anticipation (3): "I have no doubt that that book was in the *British Museum* catalogues. Of course I cannot say it was"—in this case it is proved that it was—"We know that, after two years, it would have been in the catalogue, and in fact long before; and there was nothing to shew that it was not read or used; and in the absence of evidence to the contrary, the presumption was the other way." By which I understand Sir *George Jessel* to have said that if there be a book in the *British Museum*, the presumption is that it has been read. I find it very difficult indeed to go along with Sir *George Jessel* in that presumption. I do not know the authority for it. He gives no authority for it. And the point was not raised by *Plimpton* v. *Malcolmson*, where there was no copy in the *British Museum*, and no copy sufficiently published elsewhere.

If I am to accept Mr. *Moulton's* argument, I must come to this conclusion, that it is only necessary to prove that a book is in the

(1) 3 Ch. D. 531. (2) 1 Webs. Pat. Cas. 553.
(3) 3 Ch. D. 560.

PEARSON, J. 1885 OTTO v. STEEL.

British Museum, and I am then to hold that that book has been published in this country for the purpose of an action like this, and that whatever is contained in that book has become part of the common stock of knowledge in this country. As the authorities stand which have been cited before me, and the counsel before me are well aware of them, there is no decision, to my mind, that lays down such a proposition as that, and I cannot help thinking that I should be doing injustice probably to many persons if I were to say that inventions honestly made by them were to be held to be bad because they might have been anticipated by something to be found in a book in the library, for which nobody had ever called, and nobody had ever read in this country.

I cannot go as far as that, and therefore, there being not only no evidence before me that any other copy of this book has ever reached *England*, but, to my mind, evidence rather to shew that no other copy ever has been known or seen in this country, I must hold that the simple fact that it is to be found in the inner library of the *British Museum* is not sufficient publication for me to hold that whatever is found in that work has become part of the public stock of common knowledge.

Solicitors: *Faithfull & Owen; Pitman & Sons*, agents for *Markland & Davy, Leeds.*

D. P.

In re ROBINSON. PICKARD *v.* WHEATER.

PEARSON, J.

1885

Nov. 21; *Dec.* 14.

[1885 R. 2187.]

Rules of Supreme Court, 1883, *Order* LI., *r.* 1; *Order* LV., *r.* 3—*Originating Summons—Approval of Sale by Court—Order for Sale of Real Estate—Infant.*

Under r. 3 (*f*) of Order LV. the Court can only approve of a sale which the executors or trustees of the will or deed to which the originating summons relates could have made themselves.

Under r. 1 of Order LI. the Court has power to order a sale of real estate only when it is necessary or expedient for the purposes of the action before it that the property should be sold.

No new power to order a sale is conferred.

ORIGINATING SUMMONS asking for an order approving of the sale of certain freehold hereditaments forming part of the estate of *Israel Robinson*, who died on the 15th of January, 1859, upon the terms of an agreement dated the 20th of January, 1885, and made between *William Pickard*, one of the Plaintiffs, and *Richard Elsworth*, one of the Defendants.

William Pickard was the executor of the will of *Israel Robinson*. Under the will seven persons were now entitled in possession to the hereditaments comprised in the agreement for sale, as tenants in common in fee. Six of these persons were of age, and the seventh, *Ralph Wheater*, was an infant. Five of the adults and a mortgagee of the sixth were co-Plaintiffs with the executor; the sixth adult and the infant were co-Defendants with *Elsworth*. The property consisted of houses which could not be divided among the persons entitled.

The summons also asked the Court to determine (without administration) whether the legal estate in the property was vested in *William Pickard*, or in the persons who would be entitled to the proceeds of sale; whether the infant's share of the proceeds of sale should be paid into Court, or invested in the joint names of the executor and the purchaser or otherwise; and that, if the legal estate in the property was in the persons entitled to the

PEARSON, J. 1885

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proceeds of sale, the executor might be appointed to convey the infant's share to the purchaser.

G. E. S. Fryer, for the summons :—

All the adult persons who are interested in the property desire that the sale should be carried out, and it will be beneficial to the infant. The property cannot be divided; it is in a bad state of repair, and there is no fund, except the rents, available to pay for the repairs. The Court has power to approve the sale under rule 3 (*f*) of Order LV., which rule authorizes the taking out of an originating summons.

At any rate, the Court can order the property to be sold under rule 1 of Order LI. (1): *Miles* v. *Jarvis* (before Mr. Justice *Kay*, 21st Nov. 1883). An originating summons is a "cause" or a "matter," and it has been held by the Court of Appeal to be an "action": *In re Fawsitt* (2).

Rule 1 of Order LI. differs from sect. 55 of the Act 15 & 16 Vict. c. 86, in that there the power to sell was given only "for the purposes of such suit." The omission of those words from rule 1 shews that the power is now more extensive.

PEARSON, J.:—

The result of your argument would be that actions for partition would be superseded. Any one might obtain an order for sale, although sect. 4 of the *Partition Act*, 1868, says that an order for sale can be made only at the request of parties interested to the extent of one moiety or upwards in the property. I do not think this was intended. I must take time to consider the case.

Dec. 14. PEARSON, J. (after stating his opinion that the legal estate in the property was vested in the seven persons who would

(1) Order LI., r. 1. "If in any cause or matter relating to any real estate, it shall appear necessary or expedient that the real estate or any part thereof should be sold, the Court or a Judge may order the same to be sold, and any party bound by the order and in possession of the estate, or in receipt of the rents and profits thereof, shall be compelled to deliver up such possession or receipt to the purchaser, or such other person as may be thereby directed."

(2) 30 Ch. D. 231.

be entitled to the proceeds of sale as tenants in common in fee, continued):—

The property cannot be divided, and it is therefore expedient that it should be sold. It might be sold in a partition action, but, instead of such an action, an originating summons has been taken out under rule 3 of Order LV., and the Court is asked to approve of a contract for sale which has been entered into by the executor, and sub-sect. (*f*) of rule 3 is relied upon as giving the Court jurisdiction. [His Lordship read rule 3.] The matters dealt with in the first five sub-sections (*a*) to (*e*) are all of them matters properly arising in the administration of the trusts of the deed or will to which the summons relates. I apprehend, therefore, that sub-sect. (*f*) refers to the approval of any sale which could be made by the executors or trustees of a will or deed, and which, but for this order, the executors or trustees might have been obliged to make at their own discretion, or for which they could have obtained the direction of the Court only in a proper administration action. I do not think that the rule gives the Court any power to direct a sale in a case in which it had no power to do so previously. But it is said that rule 1 of Order LI. may be called in aid. [His Lordship read the rule.] That rule is taken from sect. 55 of the Act 15 & 16 Vict. c. 86, from which it differed by the omission of the words "for the purposes of such suit." Those are, no doubt, important words, and the applicant is fully entitled to rely on their omission as shewing that the Court has now a larger power than it had under sect. 55. *Jessel*, M.R., laid it down that those words meant "for the purposes of the suit only." But still I think the rule means that the Court may order a sale whenever it is necessary for the purposes of the action, and that it was not intended to enable the Court to sell real estate when otherwise it had no power to do so. It is said that here there is an action properly commenced by originating summons, and that the Court has every power which it would have in any other action, and I was referred to *In re Fawsitt* (1) as shewing that an originating summons is an action, and that the rules which relate to actions apply to it. Independently of that authority, I should have had

(1) 30 Ch. D. 231.

PEARSON, J. 1885 *In re* ROBINSON. PICKARD *v.* WHEATER.

no doubt that that was so. But at any rate there is some difference between a summons taken out for the determination of some particular question or questions, and an action for the general administration of an estate. If this summons is to be treated as expressly asking for a sale under rule 1 of Order LI., I am of opinion that it is not a proper originating summons under rule 3 of Order LV. It was not intended that that rule and rule 1 of Order LI. should be combined in this way, or that the Court should have a power of selling an infant's property which it never had before. There are no trusts to administer, and I think I can only approve of such a sale as the executor could have previously made himself. Rule 3 of Order LV. gives the Court power only to approve a sale; not to order a sale. I think I have no power to order a sale under rule 1 of Order LI. I must therefore refuse the application, and I do so with the less hesitation because there are two other ways in which an order for sale can be obtained, and with as little expense as by means of a summons; I mean under the *Partition Act* and under the *Settled Land Act*, 1882.

Leave was then given to amend the summons by entitling it in the matter of the *Settled Land Act*, and it was referred to Chambers to appoint trustees for the purposes of the Act.

Solicitors: *W. & J. Flower & Nussey*, agents for *Killick, Hutton, & Vint, Bradford.*

W. L. C.

HALL-DARE *v.* HALL-DARE.

C. A.
1885
Nov. 20, 21.

[1883 H. 3142.]

Disentailing Deed—Resettlement—Mistake—Rectification—Jurisdiction—Fines and Recoveries Act (3 & 4 *Will.* 4, *c.* 74), *ss.* 40, 47 [*Revised Ed. Statutes, vol. vii., pp.* 499, 500].

The Court is not prohibited by the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74), s. 47, from exercising its ordinary jurisdiction to rectify, on the ground of mistake, a deed of resettlement which has been enrolled as a disentailing assurance under the Act:—

Judgment of *Bacon*, V.C., reversed.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* (1), dismissing an action for rectification, on the ground of mistake, of a deed which had been enrolled as a disentailing assurance under the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74).

Robert Westley Hall-Dare by his will, dated the 25th of January, 1836, devised his estates in the county of *Essex* to the use of his son, the Plaintiff, *F. M. Hall-Dare*, for life, with remainder to the use of the first and other sons of *F. M. Hall-Dare* in tail general, with remainder to the use of testator's son, the Plaintiff, *Henry Hall-Dare*, for life, with remainder to the use of the first and other sons of *Henry Hall-Dare* in tail general, with remainder to the use of testator's son, *R. W. Hall-Dare* (No. 2), for life, with remainder to his first and other sons in tail general, with remainders over.

The testator died on the 20th of May, 1836, leaving the three sons named in his will.

F. M. Hall-Dare was a bachelor. *Henry Hall-Dare* had issue one son, *H. A. K. Hall-Dare*, who died in November, 1880. *R. W. Hall-Dare* (No. 2) died in 1866, leaving one son, *R. W. Hall-Dare* (No. 3), who died in 1876, leaving two sons, the Defendants, *R. W. Hall-Dare* (No. 4) and *A. M. Hall-Dare*, both infants. In February, 1878, by a deed enrolled as a disentailing assurance under the *Fines and Recoveries Act*, after reciting that the Plaintiffs, *H. Hall-Dare* and *H. A. K. Hall-Dare*, were desirous (the

(1) 29 Ch. D. 133

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Defendant, *R. W. Hall-Dare* (No. 4), being already amply provided for by a previous settlement therein mentioned) of resettling the devised estates, it was witnessed that the Plaintiff, *H. Hall-Dare* and the said *H. A. K. Hall-Dare*, with the consent of the Plaintiff, *F. M. Hall-Dare*, as protector of the settlement, granted to a trustee the devised estates subject to *F. M. Hall-Dare's* life estate, but freed and discharged from the life estate in remainder of *H. Hall-Dare*, and from the estate tail of *H. A. K. Hall-Dare*, and the subsequent estates in remainder to the use of *H. Hall-Dare* for life, in substitution for his life estate in remainder under the will, "and from and after the death of the said *H. Hall-Dare* to the use of the said *H. A. K. Hall-Dare* and the heirs of his body, and in default of such issue to the use of *A. M. Hall-Dare* and his assigns during his life without impeachment of waste, and from and after the death of *A. M. Hall-Dare*" to the use of his first and other sons in tail, with remainder to the use of *R. W. Hall-Dare* (No. 4) for life, with remainder to his first and other sons in tail, with remainders over.

H. A. K. Hall-Dare died on the 27th of November, 1880, a bachelor, and without having barred his estate tail under the resettlement of 1878.

H. Hall-Dare married again in 1882, and it having been discovered that, contrary to the intention of the parties to the resettlement of 1878, and the belief under which they executed it, the limitation to the sons of *H. Hall-Dare* other than *H. A. K. Hall-Dare* had by inadvertence been omitted, the Plaintiffs, *F. M. Hall-Dare* and *H. Hall-Dare*, brought this action in 1883 for the purpose of having the resettlement rectified, so as to effectuate the alleged intention of the parties, by the insertion therein, next after the estate tail thereby limited to *H. A. K. Hall-Dare*, of a limitation to the second and other sons of the Plaintiff, *H. Hall-Dare*, in tail general.

The evidence in support of the Plaintiffs' case, and the circumstances under which the resettlement of 1878 was prepared and executed, are fully stated in the previous report (1).

Vice-Chancellor *Bacon* dismissed the action with costs, being of opinion that sect. 47 of the *Fines and Recoveries Act* positively

(1) 29 Ch. D. 136, 137.

prohibited the exercise by Courts of Equity of their ordinary jurisdiction to rectify mistakes in the case of deeds which had been enrolled under the Act.

From this decision the Plaintiffs appealed.

Hemming, Q.C., and *E. W. Byrne*, for the Appellants:—

The Court has inherent jurisdiction to rectify mistakes in a settlement, and there is nothing in the *Fines and Recoveries Act* to take away this jurisdiction, although it is contended by the Respondents, and has been held by the Court below, that the 47th section of that Act has this effect. The scope and object of the Act is to abolish the old and objectionable method of barring estates tail by fine and recovery, and to substitute for it a new process of barring such estates by simple deed enrolled. But it is, and was then, a principle of Equity to treat a thing contracted to be done as actually done, to supply defects in execution, and to enforce the specific performance of contracts. So it was necessary in providing the machinery for barring estates tail, in order to prevent such machinery from being set aside, and estates tail being barred by contract without deed, to exclude to a certain extent the jurisdiction of Courts of Equity. As is said in *Hayes* on Conveyancing (1): "After the Legislature should have abolished the ancient solemnities, and conferred upon tenants in tail the power of conveying as if seised in fee simple, without any other ceremonies than sealing, delivery, and enrolment, there was ground to apprehend that Equity might be induced to enforce the mere contract of a tenant in tail founded on valuable or meritorious consideration; just as in a case of a settlement to such uses as *A.* shall by deed enrolled in Chancery within six calendar months after the execution, appoint, and in default of appointment to uses in strict settlement, Equity would certainly supply in favour of a purchaser, wife, child, or creditor the non-observance of the prescribed formalities."

Accordingly the Act (which deals exclusively with the mode of barring estates tail, and does not touch resettlements) in sect. 40 excludes all parol arrangements, and requires every disposition by a tenant in tail to be by deed; requires (sect. 41)

(1) 4th Ed. p. 146.

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every such deed to be enrolled, and (sect. 46) the consent of the protector, if given by a separate deed, to be also enrolled; and by sect. 47 excludes the jurisdiction of Courts of Equity in regard to (1) the specific performance of contracts; (2) the supplying of defects in, or want of, execution of powers of disposition and consent; and (3) in regard to giving effect to any act or deed by a tenant or protector which would not be an effectual disposition or consent under the Act.

Taking these three heads of the 47th section *seriatim*:—

The object and intention of the family, *i.e.*, of *F. M. Hall-Dare*, *H. Hall-Dare*, and *H. A. K. Hall-Dare*, in effecting the disentailment and resettling of this estate was simply to put *Arthur Mildmay Hall-Dare* before his elder brother, *Robert Westley Hall-Dare*, who was amply provided for under another settlement; and in carrying out this object and intention they instructed their solicitors that all the estates and limitations prior to the estate tail of *Robert Westley Hall-Dare*, should be preserved. Accordingly, this is the case of three persons agreeing to act together for the alteration of a settlement; a case of *consensus*, and not of contract at all. Any number of persons may agree together to do an act without making it a contract, and if they do, they must be regarded in the doing of the act as one person. This relieves the Appellants from any difficulty arising from the first clause of sect. 47, which was evidently intended to meet the contingency of the Court having brought before it something which was not a deed in accordance with the Act, but rested only in contract. The later clauses of the section clearly are directed to such cases as the imperfect execution by a tenant in tail of the instrument barring his estate, or by the protector of his power of consent. And thus the section does not touch our case at all. This deed is not defective as a disentailing assurance in any of the solemnities required by the Act. All that we ask is to supply an omission in a resettlement which, if made by separate deed, need not have been enrolled at all, and the mere accident of the resettlement having been contained in the same deed as the disentailment, cannot take away the jurisdiction to rectify the resettlement so as to make it carry out the undoubted intention of the parties. Otherwise the Court would be precluded from rectification even

in cases of fraudulent error or clerical error, such, for instance, as the insertion of a wrong name in a relimitation. The question in this case has never been before distinctly argued and decided, but the Court has interfered to a certain extent, and declared that the provisions of a deed were not in accordance with the intention of the parties: *Richards* v. *Fitzgerald* (1); and has decided that a deed may be reformed so as to be confined to the object intended by the parties: *Walker* v. *Armstrong* (2). Moreover, there are no mechanical difficulties in the way. It is not the deed itself which is enrolled, but only a copy. The custody of these documents is now transferred to the Keeper of the Record Office, but the Clerk of Enrolments has access to them. If it was a mere clerical error it would be corrected as a matter of course, and if the Court considers that there has been a mistake in this case, and orders the rectification of the deed, there will be no practical difficulty in making the resettlement clerically stand so as to effect the real intention of the parties.

Marten, Q.C., and *Ribton*, for the Respondents:—

We submit that the Act positively forbids such a rectification as the Plaintiffs desire.

[LORD HALSBURY, L.C.:—You would not deny the general jurisdiction of the Court but for statute.]

Not in a proper case, but this is not so. In the first place the relief which the Plaintiffs ask must be founded on some supposed contract.

[FRY, L.J.:—Is the jurisdiction as to specific performance the same as the jurisdiction to rectify.]

The latter is a branch of the former. Specific performance cannot be decreed of a contract by a tenant in tail to execute a disentailing assurance: *Hilbers* v. *Parkinson* (3).

[FRY, L.J. referred to *Thompson* v. *Whitmore* (4)].

The third clause of the 47th section is fatal to the Appellants' contention, and entirely takes away from the Court the power of rectifying mistakes. Mistakes cannot be pleaded under "*non est*

(1) 9 Ir. Eq. Rep. 486.
(2) 8 D. M. & G. 531.
(3) 25 Ch. D. 200.
(4) 1 J. & H. 268.

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factum." This is not, however, a mistake in the sense in which Courts of Equity have given relief against mistakes. It cannot be said that the parties to the deed ever intended that the limitation of an estate tail to the sons of *H. Hall-Dare* other than *H. A. K. Hall-Dare* should be inserted, for *H. Hall-Dare* at the time had no other son than *H. A. K. Hall-Dare*, and none of the parties ever contemplated the possibility of a second marriage of *H. Hall-Dare*. Moreover, the time has gone by for any rectification. *H. A. K. Hall-Dare*, one of the parties to the deed, is now dead, and the deed, as altered in 1885, would not be the same deed as that to which the protector of the settlement gave his consent in 1878, but practically an entirely new deed.

The Act prescribes certain simple formalities which must be strictly observed. The consent of the protector of the settlement to the disposition by the tenant in tail must be given either by the same assurance, or, if by a distinct deed, such deed must refer to the disentailing assurance, and the consent must be confined to the disposition thereby made. *H. A. K. Hall-Dare*, if living, could not bring an action against the protector of the settlement to obtain rectification, as the protector would rely upon sect. 43, nor has *Henry Hall-Dare* any right of action against him. Consequently, want of mutuality would prevent any corresponding right of action by his protector.

[They referred to sects. 34, 37, 40, 41–43, 46 and 47 of the *Fines and Recoveries Act*.]

Hemming, in reply.

In reference to the usual course in rectifying a deed, of directing the declaration of the Court to be indorsed on the deed, *Seton* on Decrees (1) was referred to.

LORD HALSBURY, L.C. (after stating the facts, said):—

All parties intended to execute and did execute the re-settlement in the full belief that it carried out their instructions, and that the alteration made in the course of succession was the only alteration. Under that belief, this deed of resettlement was executed in February, 1878, and it is contended on behalf of the

(1) 4th Ed. p. 1234.

Plaintiffs that the omission of the particular limitation was a mistake within the ordinary jurisdiction of the Court to rectify.

Apart from the question as to the particular nature of the instrument, it has been but very faintly contended that this was not a case in which the Court would rectify the deed, which as executed did not carry out the intention of the parties. But it was said that although as a general rule the Court had this power, the jurisdiction in this case was limited by the terms of the Act of Parliament under which the particular instrument was executed, and the Vice-Chancellor appears to have decided the case upon that view. Now, the Act of Parliament has not in express terms excluded the jurisdiction of the Court to rectify instruments on the ground of mistake. It provides a different mode of barring estates tail, and has provided that in future the particular instrument to be enrolled shall be the instrument containing the legal dispositions of the parties, and by which alone the rights of the parties are to be determined. So express is the enactment that the Legislature, having before it the knowledge that the Court of Chancery had thought right to give effect to other documents than proper legal instruments, goes out of its way to exclude the jurisdiction of the Court with regard to supplying and remedying defective executions of powers and other matters, and contains express provisions, the effect of which is that the effect of the instrument and the rights of the parties shall be determined by the instrument which has been enrolled, and that there shall be no other instrument outside the enrolled deed which shall affect the legal dispositions made by the tenant in tail and the protector of the settlement. Now, it seems to me, with all respect to the learned Vice-Chancellor, that this provision has no reference to the present application, which is an application to amend an instrument on the ground that it is not the instrument which the parties intended to execute and believed they were executing. The purport of the Act is that there shall be one instrument, attended with certain formalities, including enrolment, and that nothing but that instrument shall be effectual as a disposition of the estate comprised in it. But what has that to do with the question whether that instrument as executed carries out the real intention of the parties. It appears

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to me to be entirely beside the question. The Legislature, having before it the jurisdiction of the Court of Chancery to rectify deeds, and by sect. 47, excluding, as it does, in terms the jurisdiction to give effect to acts outside, or deeds outside and beyond the particular instrument, has provided what shall be the mode by which the transaction of barring an estate tail can be effected, but has omitted any reference to the well-known power of rectification. It must, therefore, have been intended to leave this jurisdiction unaffected. The only argument upon the Act which was of any force was that this case comes within the words of sect. 47, "in regard to . . . any act or deed by a tenant in tail or protector of a settlement which in a Court of Law would not be an effectual disposition or consent under this Act:" it being said that instructions might be taken to be an "act or deed" to which this Court was asked to give effect. This argument was ingenious, but fallacious. What the Court is asked to do is, not to alter a deed, but to restore the instrument which has been enrolled to the form which the parties who executed it intended it should be in at the time when they executed it. It is a fallacy, therefore, to call this an alteration of a deed, and I cannot help thinking that the Vice-Chancellor has taken too narrow a view of the Act. For these reasons, I am of opinion that the judgment of the Vice-Chancellor cannot be supported, and the appeal must be allowed.

LINDLEY, L.J.:—

I agree. If it had been intended by the Act to deprive the Court of the power of rectification, it ought to have been so stated in words which could not be mistaken. It would be too monstrous to construe sect. 47 so as to preclude the Court from setting aside for fraud a disentailing deed after enrolment. The same observation appears to apply to cases where, by mistake or accident, a deed is executed and enrolled in a form which was not intended. Can it be said that the parties in such circumstances are to have no remedy? Looking at the language of sect. 47, it appears to have been directed to a different class of cases altogether. If the Legislature had meant to make a deed when enrolled unalterable there would be something in the

argument as to the words "act or deed," but I cannot find any such intention in the Act. The object of the Act was to change the form of conveyance; and it being inconvenient that an enrolled document should have different effects at Law or in Equity, the section goes on to say in substance that the enrolled deed shall not be affected by equitable doctrines. That section assumes, however, that the document enrolled represented the intention of the parties when they executed it, and was the deed which they intended to execute.

The deed when altered will really be the deed of the parties, and there is nothing to exclude the jurisdiction of the Court to rectify the deed so as to make it conform to their intentions. Looking a little further, sect. 9 of the Act gives powers of amendment, and is it to be supposed that the Courts which had power to amend any fine or common recovery, were not to have power to amend the new deeds of disposition? It appears to me that the Vice-Chancellor lost sight of the true meaning of sect. 47, and that we ought to order the rectification to be made, and our judgment to be indorsed on the deed.

FRY, L.J.:—

I also agree, but the respect which I feel for the Vice-Chancellor induces me to add a few words.

In construing this Act we must consider the state of the law at the time when it was passed. Fines and recoveries were then in full force, and there were large powers of rectifying them, because fines and recoveries were records of the Common Law Courts, and the Courts had power to rectify their own records. There were other modes of dealing with real estate by deed, and those deeds the Court of Chancery had the power of rectifying. The Legislature was minded to substitute a more simple mode of assurance, but at the same time preserved the existing powers of rectification both for fines and recoveries levied and suffered before the Act, and for such as should be levied and suffered for a certain short period after it. Then the new mode of disentailing by deed and consent, with a particular provision for evidencing by deed both the disposition and the consent of the protector of the settlement, puts the deed in the category of deeds which

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before the Act were in the power of the Court of Chancery to rectify. The only section which requires to be considered is sect. 47. That section no doubt excludes the jurisdiction of Equity in certain cases which are therein specified. Of these it is noteworthy that the first is specific performance; next comes defective execution of powers. It is said that rectification is a branch of specific performance, but it is not so, at all events under this section. The well-known jurisdiction of specific performance relates to executory contracts, but when the deed is executed the contract is concluded, and is governed by different rules and principles. Rectification therefore is not specific performance of a contract. Nor can I find anything to support the contention that the case comes within the words "act or deed." It appears to me, therefore, that rectification was not excluded by sect. 47. I cannot but observe that if the Legislature had meant to touch the jurisdiction to rectify, one would expect to find it mentioned in the same manner that specific performance is. But not a word is said about it. In my judgment the scope of the Act is to make the enrolled deed conclusive, but it would be monstrous and highly unjust to say that the instrument on parchment is to be conclusive of the rights of the parties for all time, however great the mistake or blunder, and however clear the evidence of it. On the other hand if the deed is capable of amendment, it is most beneficial that it should be conclusive of the rights of the parties, so that it is the only instrument to which the parties need have recourse. Whether reformed or not it alone must be looked to.

I therefore agree with the judgment delivered that this deed ought to be rectified, and the judgment of the Court will be indorsed on the deed and on the enrolled copy.

Solicitors: *Freeman & Bothamley; Crawley, Arnold, & Co.*

F. G. A. W.

In re SOUTH DURHAM BREWERY COMPANY.

C. A.
1885
KAY, J.
Nov. 26, 28; *Dec.* 5.
C. A.
Dec. 9, 10.

Company—Preference Shares—Memorandum of Association—Articles of Association.

A company, with power by its memorandum of association to increase the capital, thereby stated to be "£10,000 divided into 1000 shares of £10 each," and with power by the contemporaneous articles of association "by special resolution from time to time to increase the capital of the company by the creation of new shares of such an amount as the company may by such special resolution determine, and any such new shares may be issued either with or without special privileges and priorities over the original shares,"—having gone into liquidation, a scheme for the reconstruction of the company was proposed with the sanction of the liquidator; and special resolutions were passed and confirmed for an increase of capital by the creation of new shares to be called preference shares, giving to the holders the right to a preferential dividend of 5 per cent.:—

Held (reversing *Kay*, J.), that the proposed scheme was not *ultrà vires*, and might be sanctioned by the Court.

Harrison v. *Mexican Railway Company* (1) followed.

Hutton v. *Scarborough Cliff Hotel Company* (2), *Guinness* v. *Land Corporation of Ireland* (3), and *Ashbury* v. *Watson* (4) distinguished.

THIS was a motion on behalf of two of the contributories in the *South Durham Brewery Company, Limited*, that upon payment by them of the debt due to Messrs. *Niven* (judgment creditors of the company who had issued execution) and one half of the debts due to the remaining creditors of the company, other than *Matthew Hutchinson* (the petitioning creditor), within seven days from the date of the order to be made on the motion, and of the costs of *J. & C. Niven*, and of the costs and expenses of the winding-up, and of and incidental to the reconstruction scheme, all further proceedings in the winding-up might be stayed, in accordance with the terms of a scheme of reconstruction approved by the shareholders of the company; and that so far as necessary such scheme might be approved by the Court, and all necessary directions given for the purpose of carrying the same into effect.

The company was incorporated in October, 1882, for the purpose of purchasing and working the brewery and buildings and

(1) Law Rep. 19 Eq. 358.
(2) 4 D. J. & S. 672; 2 Dr. & Sm. 514.
(3) 22 Ch. D. 349.
(4) 30 Ch. D. 376.

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the goodwill and business of the *South Durham Brewery*, and for similar objects.

By the memorandum of association it was provided (clause 5): "The capital of the company is £10,000, divided into 1000 shares of £10 each, with power to increase the capital"; and by contemporaneous articles of association (cl. 16): "The company may by a special resolution from time to time increase the capital of the company by the creation of new shares of such an amount as the company may by such special resolution determine."

17. "Any such new shares may be issued either with or without special privilege and priorities over the original shares, and with such an amount credited as paid up thereon as the company may by such special resolution determine, and the capital represented by such new shares shall be considered as a part of the general capital of the company, and shall be subject to the same provisions in all respects as if it had been part of the original capital, except so far as is otherwise provided by the resolution authorising the raising of the same."

On the 16th of May, 1885, an order was made for winding up the company on the petition of *Matthew Hutchinson*, a creditor of the company, presented on the 28th of March, 1885.

Negotiations for the purpose of resuscitating the company had been going on since the winding-up, and resulted in a scheme, to which the shareholders, with the concurrence of the official liquidator, and the creditors, including the petitioning creditor, had given their assent.

An essential part of this scheme was the increase of the capital of the company by the issue to persons, who undertook to pay the creditors, of 200 new shares of £10 each, to be called preference shares, giving to the holders the right to a fixed cumulative preferential dividend of 5 per cent. per annum.

Kay, J., before whom the matter came on the 6th of August, directed a meeting of the shareholders to be called for the purpose of considering the scheme. Accordingly a meeting was held, at which special resolutions, subsequently confirmed, were passed unanimously for the adoption of the scheme. The matter again came before the Court upon the application of *Woodward*, who was by far the largest holder of shares in the company, and

also a creditor both secured and unsecured, and of *J. Starte*, the holder of ten shares in the company, for a stay of the proceedings in the winding-up for the purpose of carrying out the reconstruction scheme, which the Court was asked to sanction.

The motion came on for hearing before Mr. Justice *Kay*, on the 26th of November, 1885.

Bramwell Davis, for the motion:—

It is submitted that the sanction of the Court should be given to the scheme proposed for the reconstruction of the company. This case comes within the decision of *Harrison* v. *Mexican Railway Company* (1). Here the memorandum of association has provided for the increase of the capital, and the contemporaneous articles not only give power to increase the capital by the creation of new shares, but such new shares may be issued with or without special privileges and priorities over the original shares. The issue of preference shares would be a proper thing to do, and there is no serious objection to it. It is not one of the things required by sect. 8 of the *Companies Act* of 1862 to be mentioned in the memorandum, and sect. 12 enables a company to modify the conditions contained in the memorandum if authorized to do so by its regulations. There is, however, no proposition to alter the memorandum, but to issue the preference shares under the authority of the memorandum and the articles.

The cases of *Ashbury Railway Carriage and Iron Company* v. *Riche* (2), *Hutton* v. *Scarborough Cliff Hotel Company* (3), *Anderson's Case* (4), *Guinness* v. *Land Corporation of Ireland* (5), and *Ashbury* v. *Watson* (6), are distinguishable from this case. Here the contract has provided for what is proposed to be done, and, the shareholders having agreed to the scheme, it can be carried out with the sanction of the Court, and it will be good as against all parties—original and new shareholders.

Ashton Cross, for the liquidator, in support of the application:—

The articles cannot alter the memorandum, with which there is

(1) Law Rep. 19 Eq. 358.
(2) Ibid. 7 H. L. 653.
(3) 2 Dr. & Sm. 514; 4 D. J. & S. 672.
(4) 7 Ch. D. 75.
(5) 22 Ch. D. 349.
(6) 30 Ch. D. 376.

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no desire to interfere, but here the memorandum may be read with the articles,—the capital may be increased and new shares may be issued with or without a preference. The articles may be used to explain the meaning of the language of the power to increase the capital. The two things were contemporaneous, and the one throws light upon the other. But in fact all creditors and shareholders have assented to the scheme, and it is submitted that the Court can properly sanction it. The effect of the decision in the case of *Hutton* v. *Scarborough Cliff Hotel Company* (1) has been qualified by later cases of higher authority.

Buckley, for the petitioning creditor, who had agreed to accept preference shares for his debt.

Dec. 5. Kay, J.:—

The sanction of the Court is required to a scheme for the reconstruction of the *South Durham Brewery Company, Limited*, which is in liquidation, and it is an essential part of the scheme that preference shares should be issued by the company in order to carry it out. The question is whether the company have power to issue preference shares.

The memorandum of association of the company provides:—[His Lordship read clause 5 and continued:—]

No one could doubt if that were all, that the meaning was, that the shareholders of the capital should be upon an equality, and that the increase of the capital would be *primâ facie* by issuing more shares which would be upon the same footing in all respects as the original shares. But in the contemporaneous articles there are these provisions:—[His Lordship read articles of association 16 and 17 and continued:—]

The corresponding provisions in table A to the *Companies Act* contain no power to confer any priorities. The 8th and 12th sections of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), provide:—[His Lordship referred to them and continued:—]

In the well-known case of *Ashbury Railway Carriage and Iron Company* v. *Riche* (2), Lord *Cairns* says (3): "With regard to the

(1) 2 Dr. & Sm. 514; 4 D. J. & S. 672. (2) Law Rep. 7 H. L. 653.
(3) Law Rep. 7 H. L. 667.

memorandum of association, your Lordships will find, as has often already been pointed out, although it appears somewhat to have been overlooked in the present case, that that is, as it were, the charter, and defines the limitation of the powers of a company to be established under the Act. With regard to the articles of association, those articles play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company, and so accepting it, the articles proceed to define the duties, the rights and the powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made." And in that case it was held that a clause in the articles contemplating an extension of the objects of the company beyond those stated in the memorandum was *ultrà vires*. Now if the memorandum in this case had expressly stated that all shareholders of the existing or increased capital were to be upon an equal footing, it is clear that could not be altered by any provision in the articles or any special resolution of the company. But it was said that, the memorandum being silent as to the issue of preference shares, and preference as to dividends among the shareholders not being one of the things which by sect. 8 of the *Companies Act* of 1862 is required to be stated in the memorandum, it is legitimate to construe the articles and memorandum together, and thus to treat the memorandum as though it provided that the increased capital might be issued with a preferential dividend.

In *Hutton* v. *Scarborough Cliff Hotel Company* (1), where a memorandum was silent as to preference shares, it was held that no part of the original capital could be issued with a preferential dividend, as the meaning of the memorandum was that the shareholders should be on an equality. Thereupon the company determined to raise additional capital, and they passed resolutions altering their articles of association so as to contain a provision that in the event of the company authorizing the raising of additional capital the directors might pay upon it a preferential

(1) 2 Dr. & Sm. 514; 4 D. J. & S. 672.

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dividend. The case came before Sir *R. Kindersley*, V.C. (1), and he restrained the company from doing that by injunction, on the ground that the issuing of new shares with a preferential dividend would be an alteration of the constitution of the company as fixed by the memorandum.

But in *Harrison* v. *Mexican Railway Company* (2), where the memorandum and articles were substantially the same as in the present case, the late Master of the Rolls distinguished the case from *Hutton* v. *Scarborough Cliff Hotel Company* (3), holding that the implied equality upon the memorandum between the shareholders was rebutted by the terms of the contemporaneous articles. That, however, was decided before *Ashbury Railway Carriage and Iron Company* v. *Riche* (4) in the House of Lords, and although that case was not new law it was the most clear and emphatic expression of the law as to the special functions of the memorandum of association that had been given. In *Anderson's Case* (5) there is this *dictum* by Lord Justice *Baggallay*: "Supposing the memorandum to have provided that the capital should be £200,000, divided into a certain number of shares of a certain amount, and the articles of association to have added that the capital of £200,000 should be divided into A shares and B shares, and that there should be a preferential dividend as far as regards the A, or as far as regards the B shares, I see no inconsistency between the articles of association and the memorandum of association in such a case." In *Guinness* v. *Land Corporation of Ireland* (6), Lord Justice *Cotton* said (7): "The articles cannot in my opinion alter or vary that which would be the result of the memorandum standing alone. A special resolution cannot alter the memorandum in any way, and in my opinion (though the case may be different where, as may sometimes happen, the memorandum introduces something which the Act does not require to be stated in it), that which is required by the Act to be provided for, and is provided for in the memorandum, can no more be altered by the articles than by a special resolution. There are, indeed, some

(1) 2 Dr. & Sm. 521.
(2) Law Rep. 19 Eq. 358.
(3) 2 Dr. & Sm. 514; 4 D. J. & S. 672.
(4) Law Rep. 7 H. L. 653.
(5) 7 Ch. D. 75, 106.
(6) 22 Ch. D. 349.
(7) 22 Ch. D. 376.

observations of the Master of the Rolls which might seem to militate with that position." His Lordship then referred to *Harrison* v. *Mexican Railway Company* (1), and, after quoting the language of the Master of the Rolls to which I have referred, continued (2): "I think that there the Master of the Rolls was referring to matters which the Act does not require to be stated in the memorandum. But in reality it is not by implication from the construction of the memorandum that the equality of the shareholders as regards dividends arises, but by the implication which the law raises as between partners unless their contract has provided the contrary." Lord Justice *Bowen* said (3): "How can it be said that in all cases the fundamental conditions of the charter of incorporation, and the internal regulations of the company are to be construed together. *Harrison* v. *Mexican Railway Company* was cited as shewing that the Master of the Rolls was willing to read the two together, but the distinction is obvious that in that case the matter was one with which the creditors had no concern whatsoever." In the recent case of *Ashbury* v. *Watson* (4) the Court of Appeal held that an express provision in the memorandum as to some of the shares being preference shares was a fundamental condition of the company, although not one of those matters which the 8th section of the *Companies Act* of 1862 expressly requires to be stated in the memorandum, and therefore could not be altered by a special resolution. The position, therefore, is this:—The memorandum provides that the shares issued and to be issued are to be without priority: *Hutton* v. *Scarborough Cliff Hotel Company* (5). That is a fundamental condition of the company: *Ashbury* v. *Watson*. A fundamental condition in the memorandum cannot be altered by the articles: *Ashbury Railway Carriage and Iron Company* v. *Riche* (6). But the memorandum may be construed by the articles so as to alter that: *Harrison* v. *Mexican Railway Company*. I cannot satisfactorily to my own mind reconcile the last proposition with those preceding. No doubt the consequence of holding that a provision in the

(1) Law Rep. 19 Eq. 358.
(2) 22 Ch. D. 377.
(3) Ibid. 381.
(4) 30 Ch. D. 376.
(5) 4 D. J. & S. 672.
(6) Law Rep. 7 H. L. 653.

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articles that preference shares may be issued is inoperative unless there be a like provision in the memorandum, is to add to the matters which are expressly required by sect. 8 of the Act of 1862 to be stated in the memorandum. But *Ashbury Railway Carriage and Iron Company* v. *Riche* (1) decided that it is not the function of the articles to contain provisions as to the constitution of the company, but only for its internal regulation, and it seems to be the inevitable consequence that if a company desires to have power to issue preference shares, that, being an important part of its constitution, should appear not in the articles, but in the memorandum. It seems to me very arguable that sect. 8 implies, though it does not express, that this should be the case. My own opinion is, that it is not legitimate to alter the memorandum in any matter relating to the constitution of the company, either by special resolution or by reading into it a provision in the articles. For these reasons I am not satisfied that the Court has power to sanction this scheme.

T. F. M.

C. A.

From this decision the present appeal was brought. The appeal came on for hearing on the 9th of December, 1885.

Hastings, Q.C., and *Bramwell Davis*, in support of the appeal :—

The creation of preference shares does not affect the rights of creditors. As regards shareholders, to some extent at least, the memorandum, where its terms are not express, or where there is any ambiguity, may be explained by the contemporaneous articles; and so long as the power given by the articles does not conflict with, but merely explains and supplements the memorandum, it is valid: it being no part of the memorandum to say anything as to priorities: *Anderson's Case* (2).

Harrison v. *Mexican Railway Company* (3), which is almost identical with this case, is a clear authority that the increase of capital authorized by the memorandum may be validly carried out by the issue of preference shares as provided by the articles, and that special resolutions to that effect are not *ultrà vires*. That case having been now accepted as an authority, and been

(1) Law Rep. 7 H. L. 653. (2) 7 Ch. D. 75.
(3) Law Rep. 19 Eq. 358.

treated as binding by the text-books, will not lightly be disregarded: *In re Hallett's Estate* (1). And where the memorandum is silent, a power in the articles to create preference shares has been held sufficient: *In re Bangor and Portmadoc Slate and Slab Company* (2). And that the articles may be looked to in respect of matters which are not required by the *Companies Act* to be stated in the memorandum, and with which the creditors, as distinguished from the shareholders, have no concern whatsoever, is recognised in *Guinness* v. *Land Corporation of Ireland* (3).

Ashbury v. *Watson* (4) was also referred to.

Ashton Cross, for the liquidator, did not oppose.

LINDLEY, L.J.:—

This is an application to the Court under the *Companies Act*, 1862, for the approval of a scheme for the reconstruction of the *South Durham Brewery Company*, now in liquidation, which was formed and registered under the *Companies Act*, 1862.

The memorandum of association states the objects for which the company was established, and clause 5 provides that "the capital of the company is £10,000, divided into 1000 shares of £10 each, with power to increase the capital." Contemporaneously with the memorandum a series of articles was registered which state (cl. 16, 17), that an increase of capital may be made by the issue of preference shares. The question is whether this provision is or is not within the powers of the company. The point raised does not come before the Court for the first time, and but for certain slight differences between the cases the point might be considered as covered by *Harrison* v. *Mexican Railway Company* (5). In order to decide the question, it is necessary to bear in mind the various enactments contained in the Act of 1862 relating to the memorandum and articles of association. These provisions are contained in sects. 8–12. The object of the memorandum appears from the Act, and still more from the very valuable commentary upon it in *Ashbury Railway Carriage and*

(1) 13 Ch. D. 696.
(2) Law Rep. 20 Eq. 59.
(3) 22 Ch. D. 349.
(4) 30 Ch. D. 376.
(5) Law Rep. 19 Eq. 358.

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Iron Company v. *Riche* (1), to be, that it is the charter of incorporation containing the objects of the company and the principle on which it is formed, and that the memorandum is unalterable. This has been a little modified by subsequent legislation, by which the power of reducing capital has been granted. The articles of association have a different object, viz. to regulate the internal management of the affairs of the company, including the powers given to the directors by the shareholders of the company. There are provisions in the Act for altering or modifying the articles of association subject to the provisions of the Act and to the conditions contained in the memorandum. It is not required by the Act to state when or on what terms the increase of capital is to be effected, but these are matters which, consistently with the Act, may be very properly dealt with by the articles as distinguished from the memorandum. The Act tells us (sect. 50) how the original articles may be modified by special resolution, but the point to be considered is whether there is anything in the Act or in the memorandum of association which precludes the company from saying from time to time how the capital shall be increased. In this case the memorandum gives notice to everybody that the capital may be increased. I do not attach much importance to this statement in the memorandum, as there is a statutory power (sect. 12) to increase the capital without any such statement.

The difficulty felt by Mr. Justice *Kay* in this case appears to have rested on the view that the memorandum impliedly provides that the capital shall be all of one kind, that is, that as far as the shareholders were concerned there was to be equality *inter se*; and he thought that that conclusion was forced upon him by the observations of Lord *Westbury* in *Hutton* v. *Scarborough Cliff Hotel Company* (2). But they are, I think, properly explained by Lord Justice *Cotton* in *Guinness* v. *Land Corporation of Ireland* (3), where he says that the equality of the shareholders as regards dividends arises not by implication from the construction of the memorandum, but by the implication which the law raises as between partners, unless their contract has provided the contrary.

(1) Law Rep. 7 H. L. 653. (2) 4 D. J. & S. 672.
(3) 22 Ch. D. 377.

I do not see anything in the memorandum inconsistent with the company reserving to itself power to increase its capital by the issue of new shares on more advantageous terms. It is said that these articles go beyond the powers of the memorandum, but looking at the authorities I see no case which warrants that conclusion. *Ashbury Railway Carriage and Iron Company* v. *Riche* (1) was very different in its details from this case; and when the case of *Guinness* v. *Land Corporation of Ireland* (2) is examined we shall find that we are not departing from the principle of law there laid down, or the reasoning applied to it, in deciding that this increase of capital in the way proposed is not an infringement of the memorandum. That was a very curious case, it being there attempted under cover of an ambiguous clause in the memorandum to apply part of the capital subscribed by one class of shareholders in payment of dividends to another class. The *ratio decidendi* was that the memorandum stated the object for which the capital was to be applied, and the Court decided that it was impossible to spell out of that memorandum an intention that the capital subscribed by one set of shareholders should be applied in payment of dividends to another set. There is nothing in that case in principle or decision which covers the present.

Nor do I think that *Hutton* v. *Scarborough Cliff Hotel Company* (3), or the more recent case of *Ashbury* v. *Watson* (4), affect this case.

In the former case only part of the original capital had been issued, and there was no power in the articles to issue preference shares. The directors nevertheless attempted to issue them without altering the articles. This it was decided they could not do (3). They then tried to do the same thing in another way, viz. by means of a special resolution. But it was again held that they could not do so consistently with the rights of the original shareholders (5). That case turned on the fact that the original capital had not been raised, and on the fact that the issue of preference shares was not originally contemplated. So in *Ashbury* v. *Watson* there was an attempt to vary the rights of the owners of capital as between themselves.

(1) Law Rep. 7 H. L. 653.
(2) 22 Ch. D. 349.
(3) 2 Dr. & Sm. 514; 4 D. J. & S. 672.
(4) 30 Ch. D. 376.
(5) 2 Dr. & Sm. 521.

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It appears to me that the present case comes within the principle and authority of *Harrison* v. *Mexican Railway Company* (1), which is a sound decision. It is not open to the objection that the memorandum and articles are such as to preclude the shareholders from regulating what they wish to do with the new capital; and there is nothing to warrant the idea that all the holders of the original capital may not consent to any mode of distribution of new capital by the issue of preference shares or otherwise, when they have taken power to do so in their articles—an element wanting in *Hutton* v. *Scarborough Cliff Hotel Company* (2). It appears to me, therefore, that the proposed scheme is not *ultrà vires*, and, Mr. Justice *Kay* being satisfied with the scheme in other respects, that it may be sanctioned.

Fry, L.J.:—

We have not heard any argument in support of Mr. Justice *Kay's* decision, which would have been of considerable advantage, but I confess that I am not able to follow the conclusion at which he has arrived. The question has nothing to do with any alteration in the interest of the holders of the original capital, but merely has reference to the terms on which the capital is to be increased. Even in the absence of any provision in the memorandum the company may take power to themselves to increase the capital by the issue of new shares. That will of course create competition between the different classes of shareholders, but it is competent to the shareholders to regulate the terms of this competition, and in this case the articles have been so framed as to give new shareholders equal rights to, or rights in preference over the original shareholders. But it appears to me here there is nothing inconsistent with the right to equality between the holders of the original capital. The *Companies Act*, sect. 8, requires the amount of capital to be stated in the memorandum, and Lord *Westbury* in *Hutton* v. *Scarborough Cliff Hotel Company*, held that in the construction of the memorandum and articles of association, it was to be deemed to be the predominant principle that all the shares mentioned in the memorandum were to be equal *inter se* with like rights and privileges. That conclusion in no

(1) Law Rep. 19 Eq. 358. (2) 4 D. J. & S. 672.

way affects the principle that the terms of the competition between the old and the new holders of shares may be settled in accordance with the provisions of the articles. I therefore agree in thinking that the proposed scheme may be sanctioned.

Lopes, L.J.:—

I am of the same opinion. The case is not distinguishable from *Harrison* v. *Mexican Railway Company* (1), and that case is good law.

Solicitor: *O. B. Wooler.*

F. G. A. W.

In re STRONG.

Practice—Appeal—Security for Costs—Appeal from Order to strike Solicitor off the Roll.

A solicitor who appealed from an order striking him off the roll, and directing an account and payment of moneys due from him to clients of his who obtained the order, was directed to give security for costs, it being shewn that he was in insolvent circumstances.

Whether security for costs would have been required if the solicitor had appealed only against an order striking him off the roll, *quære.*

On the 7th of December, 1885, Mr. Justice *Kay*, on a motion of the three Misses *Vaux*, made an order that *J. D. Strong* should be struck off the roll of solicitors, and that an account should be taken of moneys due from him to the Misses *Vaux*, and that he should pay the same with interest and costs within a month from the date of the Chief Clerk's certificate.

On the following day, *Strong* served notice of appeal on the Misses *Vaux* and the Incorporated Law Society.

The Misses *Vaux* now moved that *Strong* might be ordered to give security for the costs of his appeal. In support of the application, evidence was adduced that *Strong* was not in a position to answer costs. It appeared that in March, 1885, he had sent a circular letter to creditors, in which he offered a

(1) Law Rep. 19 Eq. 358.

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composition of 2*s.* 6*d.* in the pound, stating his liabilities at £26,058, and his assets at £250, and that three bankruptcy petitions were pending against him. By his affidavit in opposition to the present application he stated that by far the largest portion of his debts shewn in the circular were to relatives, who had since agreed to release him from them, and that the bankruptcy petitions had been dismissed or arranged. He further stated that immediately before the first application to Mr. Justice *Kay*, he had offered to pay the applicants £200, and that that sum was actually ready to be handed over in cash.

W. Pearson, Q.C., for the application:—

[FRY, L.J.:—Has it not been said by the Court of Appeal, that it will be slow to order security for costs where a solicitor appeals from an order striking him off the roll?]

I am not aware of any such principle having been laid down.

Ringwood, for *Strong*:—

There is no proof of present insolvency, and there is evidence of a recent offer to pay £200, which goes to shew that the Appellant can pay costs. The applicants ought at all events to pay the costs of the application, as they have never asked for security: *The Constantine* (1).

LINDLEY, L.J.:—

It is not necessary in this case to decide the point, which is of some importance, whether a solicitor who appeals from an order to strike him off the roll, will, if insolvent, be ordered to give security for costs. I do not say that he will be ordered to give it, if the order appealed from is nothing more than an order to strike him off the roll. Such an order is of a highly penal character, and it may well be that the Court will allow him to appeal from it without giving security. Here the order is a mixed order, it is not merely for striking the Appellant off the roll, but for an account and payment, and he appeals from the whole of it. To such a case, in my opinion, the general rule applies. The Appellant does not in his affidavit state that he

(1) 4 P. D. 156.

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has means to pay costs, nor on the other hand does he say that he cannot give security for them. I am of opinion that security must be ordered.

FRY, L.J., concurred.

Solicitor for the Misses *Vaux*: *J. W. Sykes.*
Solicitor for *Strong*: *H. C. Barker.*

H. C. J.

In re VARDON'S TRUSTS.

C. A. 1885 *Aug.* 7, 10; *Dec.* 18.

Election—Married Woman—Settlement on Marriage of female Infant—Restraint on Anticipation—Covenant to settle after-acquired Property.

The doctrine of election is founded on the presumption of a general intention that every part of an instrument shall take effect, and the presumption of such general intention may be rebutted by an inconsistent particular intention apparent in the instrument.

Therefore, where a marriage settlement settled a fund for the separate use of the wife for life with restraint on anticipation, and contained a covenant by the wife (then an infant) to settle future property:—

Held (reversing the decision of *Kay*, J.), that the wife could not be compelled to elect between after-acquired property and her interest in the settled fund, but was entitled to retain both.

APPEAL of Mrs. *Walker* from a decision of Mr. Justice *Kay* (1). The facts sufficiently appear in the report of the case in the Court below, and in the judgment delivered by Lord Justice *Fry*.

The question raised was whether Mrs. *Walker*, on whose marriage, when an infant, £5000 was settled upon trusts under which the income was to be paid to her for her sole and separate use without power of anticipation, could take £8573, which was afterwards bequeathed to her, without bringing it into the settlement in accordance with her covenant in the deed of settlement to settle after-acquired property, and without making compensation under the doctrine of election out of the £5000. The trustees of the settlement disputed her right to take both sums, and claimed to have the income of the £5000 applied in making compensation for those disappointed by her electing to avoid her covenant to

(1) 28 Ch. D. 124.

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settle. The executors under the will having paid the £8573 into Court under the *Trustee Relief Act*, and Mrs. *Walker* having petitioned the Court for the payment of it to her, the question came before Mr. Justice *Kay* on originating summons under Order LV.

That learned Judge decided that the income of the £5000 should be applied in making compensation to the persons disappointed by Mrs. *Walker's* election.

Mrs. *Walker* appealed.

W. Pearson, Q.C., and *E. Ward*, for Mrs. *Walker*:—

The decision of Lord *Hatherley* in *Willoughby* v. *Middleton* (1) that a married woman on whom property had been settled with a restraint on anticipation must elect to bring property subsequently bequeathed to her into settlement according to her covenant to settle future property, or to make compensation out of the settled property, was strongly commented on by *Jessel*, M.R., in *Smith* v. *Lucas* (2), who there expressed an opinion adverse to such decision. To give effect to the doctrine of election there must be some disposable property under the settlement which the married woman in this case can give up, and which the Court can sequestrate or otherwise lay hold of, for compensation for what persons under the settlement are deprived of by her election: *Bristow* v. *Warde* (3). Here the income under the settlement is to be without power of anticipation, and as she cannot alienate it, so the Court cannot compel her to elect. Mr. Justice *Chitty* in *In re Wheatley* (4) followed and adopted the view of *Jessel*, M.R., in *Smith* v. *Lucas*, though in the more recent case, *In re Queade's Trusts* (5), he held that he was bound by *Willoughby* v. *Middleton*. The principle and foundation of the equitable doctrine of election are to be found in an elaborate and learned note to *Dillon* v. *Parker* (6). The point as to the married woman being restrained from anticipation, and therefore unable to give compensation, was neither argued nor decided in the House of Lords in *Codrington* v. *Codrington* (7).

(1) 2 J. & H. 344.
(2) 18 Ch. D. 531.
(3) 2 Ves. 336, 350.
(4) 27 Ch. D. 606.
(5) 33 W. R. 816.
(6) 1 Sw. 394–409.
(7) Law Rep. 7 H. L. 854.

Hastings, Q.C., and *P. Kingdon, contrà* :—

Lord *Redesdale* in the course of his judgment in *Moore* v. *Butler* (1) thus states the ground of the doctrine of election: "I see from a note which I have of a case before Lord *Rosslyn*, he put it thus—'No person puts himself in a capacity to take under an instrument without performing the conditions of the instrument; and they may be express or implied: if it is stated, or can be collected, that such was the intention of the parties to the instrument, that intention must be complied with,'" and in *Codrington* v. *Codrington* (2) Lord *Cairns*, L.C., points out that by the doctrine of election "where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them." So that this doctrine does not depend on the power of a married woman to alienate or not property, but it prevents a person taking the benefit of two things contrary to the terms of the instrument under which one of them is taken. In *Cooper* v. *Cooper* (3) Lord *Cairns*, L.C., says: "It appears to me that the rule is a rule, as it was expressed by Lord *Talbot*, calling on them to elect between the whole of their benefits under the two titles under which they claim, and that no distinction is to be made founded on some supposed intention or absence of intention on the part of the testatrix when she made one or other of her two testamentary dispositions." If the trustees of the settlement were, in obedience to the order of the Court, to refuse to pay Mrs. *Walker* her income when it became payable, there would be no question of anticipation, because it would be due then, and the doctrine of election would apply. Moreover, though a Court of Equity cannot alter the clause in restraint of anticipation, *Jackson* v. *Hobhouse* (4), yet such clause "may be subject to paramount equities, as for raising costs of suit:" *Lewin* on Trusts (5), citing *Fleming* v. *Armstrong* (6). And in such a case as this the Court may intervene and prevent the income under the settlement from reaching the married woman if she

(1) 2 Sch. & Lef. 249, 267.
(2) Law Rep. 7 H. L. 861.
(3) Ibid. 53, 67.
(4) 2 Mer. 483.
(5) 7th Ed., p. 666.
(6) 34 Beav. 109.

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take the money under the bequest contrary to her covenant to bring it into settlement. [They referred to *Codrington* v. *Lindsay* (1); *Wilson* v. *Lord Townshend* (2); *Savill* v. *Savill* (3); *Streatfield* v. *Streatfield* (4).]

Charles Parke, for the trustees of the settlement.

Stallard, for a son of the marriage.

W. Pearson, in reply.

Dec. 18. The following judgment of the Court (Lord *Esher*, M.R., and *Bowen* and *Fry*, L.JJ.) was now delivered by

FRY, L.J.:—

In the year 1860 a marriage was in contemplation between Mr. *Walker* and Miss *Vardon*. Thereupon a settlement was executed which contained, amongst other things, the recital of an agreement that the intended wife and husband should enter into the covenant thereinafter contained for the settlement of her future estate. By this settlement Mr. *Walker*, the intended husband, settled certain property upon trust for himself for life, then for his intended wife for life, and then for the children of the marriage; and by the same settlement Mr. *Vardon*, the father of the intended wife, settled other property upon the same trusts, except that as to £5000, part thereof, the intended wife took the first life interest therein, for her separate use, with a restraint on anticipation in terms to be hereafter mentioned. The settlement contained a covenant by each of them, the intended husband and wife, to settle any after-acquired property of the wife upon the trusts thereinbefore declared concerning the property of the husband, except that the ultimate trust in default of children was to be for the wife. This settlement was executed by both husband and wife, but the wife was at the date of the marriage an infant, though that circumstance does not appear on the deed.

In 1883, under a bequest to Mrs. *Walker* contained in the will of her deceased brother, she became entitled to £8573 for her

(1) Law Rep. 8 Ch. 578.
(2) 2 Ves. 693.
(3) 2 Coll. 721.
(4) Cas. t. Tal. 176; 1 W. & T. L. C. Eq. 5th Ed. 412.

separate use. Mrs. *Walker* claims to receive this sum of £8573, and also the income of the £5000 in which she had a life interest in possession without power of anticipation. On the contrary the trustees of the settlement contend that she cannot take both, and that the husband and the children of Mrs. *Walker* are entitled to have the income of the £5000 applied in compensation of their claims under the covenant to settle. Mr. Justice *Kay* has decided that the trustees' contention is right. Mrs. *Walker* has appealed.

Mrs. *Walker* contends that she is entitled to retain the benefit under the settlement because it is income settled to her separate use free from the power of anticipation: and that she is entitled to the benefit given to her by her brother's will because the will which gives it to her is operative, and the covenant which would take it away from her is inoperative.

As she was an infant at the time of the execution of the settlement and of the marriage, it is evident that her contention must prevail unless she can be reached by the doctrine of election. That doctrine rests, not on the particular provisions of the instrument which raises the election, but on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it, "the ordinary intent," to use the words of Lord *Hatherley* (*Cooper* v. *Cooper* (1)), "implied in every man who affects by a legal instrument to dispose of property, that he intends all that he has expressed." This general and presumed intention is not repelled by shewing that the circumstances which in the event gave rise to the election were not in the contemplation of the author of the instrument (*Cooper* v. *Cooper*), but in principle it is evident that it may be repelled by the declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention.

For example, if the settlement in question had contained an express declaration that in no case should the doctrine of election be applied to its provisions, there seems to be no reason why such a declaration should not have full effect given to it. The late Mr. *Swanston* appears to us to have correctly enunciated the law on this point, when he said: "The rule of not claiming by one

(1) Law Rep. 7 H. L. 71.

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part of an instrument in contradiction to another, has exceptions; and the ground of exception seems to be, a particular intention, denoted by the instrument, different from that general intention, the presumption of which is the foundation of the doctrine of election." (1)

The settlement in the present case declares that the income of the fund in question should be paid to Mrs. *Walker* for her sole and separate use, that her receipt alone should be a sufficient discharge for the same, and that she should not have power to dispose or deprive herself of the benefit thereof in the way of anticipation.

What is the force and effect of this restraint on anticipation? It provides that nothing done or omitted to be done by Mrs. *Walker* at any given time shall deprive her of the right to receive from the trustees the next and every succeeding payment of the income of the fund as it becomes due. But if she be put to her election, and if by her election she deprives herself of the right to receive subsequent payments of the income until her husband and children are compensated, it follows that she has by the act of election, or by the default in performing her covenant, deprived herself of the benefit of the income in the way of anticipation, which is the very thing which the settlement declares that she cannot do. This settlement, therefore, in our judgment, contains a declaration of a particular intention inconsistent with the doctrine of election, and therefore excludes it.

This conclusion appears to us consonant with the general understanding of men and women in *England* at the present day. A provision for a married woman who is restrained from anticipation is regarded as giving the highest security known to the law that the married woman shall, come what may to herself and her husband, have from half-year to half-year some moneys paid into her very hands to increase her comforts or to supply her with maintenance. And this security would be seriously imperilled if by the doctrine of election she could take in lieu of this inalienable provision a sum of money or other benefit which she might forthwith make over to her husband or squander at her choice. Suppose, to imagine events which nothing in the present case

(1) 1 Sw. 404, n.

suggests as probable, suppose that Mrs. *Walker* were put to her election, that she took the £8000, and that she lost her annual income of the £5000, and immediately squandered or lost the £8000, she might pass the rest of her life in that very poverty and need against which the inalienable provision of the settlement was designed to protect her.

Hitherto we have discussed this case as if it were unaffected by authority. But that is not entirely so. In *Willoughby* v. *Middleton* (1) the late Lord *Hatherley*, then a Vice-Chancellor, decided that a married woman should be put to her election between certain benefits derived under a will for her separate use without any restraint on anticipation, and the life interest to her separate use without power of anticipation given to her under a settlement executed when she was an infant; and the decision in this case was stated without any expression of disapproval by Lord *Selborne* in *Codrington* v. *Lindsay*. (2)

On the other hand, the late Master of the Rolls, Sir *George Jessel*, in *Smith* v. *Lucas* (3), criticised the decision of Lord *Hatherley* in *Willoughby* v. *Middleton*, and observed forcibly on the inconveniences which would follow if that decision were to prevail; and this case before the Master of the Rolls was referred to without disapproval by Earl *Selborne* in the House of Lords in *Cahill* v. *Cahill* (4). Mr. Justice *Chitty*, in *In re Wheatley* (5), has followed the late Master of the Rolls, whilst Mr. Justice *Kay* has in the case now under appeal followed Lord *Hatherley*. In this conflict of opinion in the Courts of the first instance and in the absence of any decision in the House of Lords or in this Court we feel ourselves at liberty, and therefore bound, to decide the question before us upon principle.

Upon principle we are of opinion, for the reasons already given, that the order of Mr. Justice *Kay* cannot be sustained, and we discharge the same, and declare that the appellant is not bound to elect.

The proceedings in the present case have arisen out of the payment into Court under the *Trustee Relief Act* of the £8573,

(1) 2 J. & H. 344.
(2) Law Rep. 8 Ch. 578.
(3) 18 Ch. D. 531.
(4) 8 App. Cas. 420, 427.
(5) 27 Ch. D. 606.

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representing the legacy given to Mrs. *Walker* by her brother's will. In that matter she presented a petition, and she subsequently took out an originating summons for the decision of the question, and the trustees of the settlement have represented all parties contesting Mrs. *Walker's* claim. We direct the costs of Mrs. *Walker* to be paid out of the fund in Court, and the costs of the trustees to be paid out of the £5000 in which she is entitled to a present life interest.

Solicitors: *Talbot & Tasker; Poole & Co.; Edward F. M. Ryan.*

W. P.

C. A. 1885 *Aug.* 10; *Dec.* 18.

STANDING *v.* BOWRING.

[1883 S. 566.]

Transfer of Stock into Joint Names—Resulting Trust—Presumption—Intention to benefit.

The Plaintiff, a widow, in the year 1880, caused £6000 Consols to be transferred into the joint names of herself and the Defendant, who was her godson. She did so with the express intention that the Defendant, in the event of his surviving her, should have the Consols for his own benefit, but that she should have the dividends during her life; and she had previously been warned that if she made the transfer she could not revoke it. The first notice the Defendant had of the transaction was a letter from the Plaintiff's solicitors about the end of 1882 claiming to have the fund re-transferred to the Plaintiff:—

Held, that the legal title of the Defendant as a joint tenant of the stock was complete, although he had not assented to the transfer until he was requested to join in re-transferring the stock, for that the legal title of a transferee of stock is complete without acceptance.

A transfer of property to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of the transfer.

Held, further, that the Plaintiff could not claim a re-transfer on equitable grounds, the evidence clearly shewing that she did not, when she made the transfer, intend to make the Defendant a mere trustee for her except as to the dividends:—

Held, therefore (affirming the decision of Mr. Justice *Pearson*), that the Plaintiff was not entitled to have the stock re-transferred to her.

ON the 3rd of November, 1880, the Plaintiff, then a widow, aged eighty-six, transferred £6000 Consols from her own name

into the joint names of herself and the Defendant *Bowring*, who was her godson, but to whom she did not stand *in loco parentis*. The transfer was made without *Bowring's* privity, but the evidence shewed that the Plaintiff made the transfer deliberately, after being warned that if she made it she could not revoke it, and that she made it with the express intention of conferring a benefit on *Bowring*, and not with the intention of making him a mere trustee for her. In December, 1882, the Plaintiff married, and shortly afterwards her solicitors wrote to *Bowring* requiring him to concur in re-transferring the stock into the name of the Plaintiff. This was the first information *Bowring* had of the stock having been transferred into the joint names. He declined to concur in a re-transfer, and this action was accordingly commenced to compel him to do so. Mr. Justice *Pearson* dismissed the action with costs (1). The Plaintiff appealed, and the appeal was argued on the 10th of August, 1885.

Cozens-Hardy, Q.C., and *Chadwyck Healey*, for the Appellant :—

There is no sufficient evidence of an intention to make a beneficial gift according to the legal effect of the transfer, and the transferor did not stand *in loco parentis* to the Defendant. The transferee had as good a legal right as the transferor to receive the dividends, and it certainly was not intended that the transferee should receive them ; there must, therefore, have been a trust for the transferor, making the beneficial interests not correspond with the legal interests. There is, therefore, a resulting trust. We contend, further, that the legal title was not made complete, for that there is a *locus pœnitentiæ* till a voluntary gift is communicated to the donee.

[LORD HALSBURY, L.C. :—Have you any authority in support of that position.]

There is no express authority to that effect, but a gift must be incomplete till acceptance, and here there was no acceptance before the revocation, for the Defendant did not know of the transfer.

[COTTON, L.J. :—Is not the gift complete when the donor has

(1) 27 Ch. D. 341.

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put the fund out of his own power. Is there any difference made by the fact that the transfer is not into the sole name of the donee?]

It does not appear that that makes any difference: *In re Eykyn's Trusts* (1), but the Plaintiff not being *in loco parentis* towards the Defendant the burden of proof is on him to prove an intention to give according to the legal effect of the transfer: *Fowkes* v. *Pascoe* (2). If there had never been any intention to make a beneficial gift the transferee must have re-transferred the stock when called upon, and if the incomplete gift is revoked it is just the same as if it had never been made.

[COTTON, L.J.:—If there was at the time of the transfer an intention to give, can there be afterwards any *locus pœnitentiæ*, the property having been actually transferred?]

Giffard, Q.C., and *Dunning*, *contrà*:—

This was a complete gift carried out by the mode of transfer suited to this kind of property. Nothing but a re-transfer could bring the stock back to the transferor, and when a transfer is complete, unless the transferor can fix a trust on the property, the legal title must prevail.

[LINDLEY, L.J.:—Is not acceptance by the donee necessary to make a complete gift?]

It is too late to revoke an intention to give when the donor has divested himself of the property.

[COTTON, L.J.:—The Acts relating to the *Bank of England* provide for acceptance of stock by a transferee, but do not make it necessary in order to complete his title, and I believe that a formal acceptance is rarely given.]

Assent by a donee is presumed unless and until he disclaims: *Xenos* v. *Wickham* (3). The donor here was warned at the time that the gift would be irrevocable, and as she went on, she must be taken to have intended an irrevocable gift. The gift was perfected so far as it could be perfected, and non-communication to the donee is not material: *Tate* v. *Leithead* (4); *Clavering* v.

(1) 6 Ch. D. 115.
(2) Law Rep. 10 Ch. 343.
(3) Law Rep. 2 H. L. 296.
(4) Kay, 658.

Clavering (1); *Doe* v. *Knight* (2). The cases which are collected under *Dyer* v. *Dyer* (3) shew that subsequent acts and declarations are not admissible on the question whether there is a resulting trust.

Cozens-Hardy, in reply:—

The proposition that acceptance of a gift is not necessary to make the gift complete would lead to serious consequences.

[COTTON, L.J.:—Could you, before any communication to the godson, have brought an action against the bank to compel them to put it back into your name on the ground that the donee had not accepted it?

LINDLEY, L.J.:—Is not a person to be presumed to have accepted any gift which involves no liability?]

1885. Dec. 18. LORD HALSBURY, L.C.:—

The Plaintiff in this case being in the year 1880 eighty-six years of age, and being at that time possessed of Consols to the amount of £6000, transferred them, by an instrument appropriate for that purpose, into the names of herself and her godson, *Robert Alner Bowring*. I think it was proved that she was aware, when she did this, that she would be able during her lifetime to receive the dividends, and that if her godson survived her, which seemed probable, he would become entitled as survivor to the Consols so transferred. I think it is proved that this was her object and intention, but, for the reason which she herself explained, namely that the anticipation of wealth would make him less active in the duties of life, she kept from him any knowledge of the disposition she had made. Two years afterwards she married, and shortly afterwards the Defendant became aware for the first time of the facts above stated, by the receipt of a letter requiring him to retransfer into the name of Mrs. *Standing* the stock in question. The facts which I have assumed to be proved seemed upon the argument to have disposed of every question but one, and that

(1) Prec. Ch. 235.
(2) 5 B. & C. 671.
(3) 1 W. & T. L. C. Eq. 5th Ed. p. 223.

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one is whether the intended gift was complete, in which case it would not be revocable at the option of the donor, or whether the gift was not complete, but rested only in intention, although the subject-matter of the gift did not remain within the control of the donor. If the matter were to be discussed now for the first time, I think it might well be doubted whether the assent of the donee was not a preliminary to the actual passing of the property. You certainly cannot make a man accept as a gift that which he does not desire to possess. It vests only subject to repudiation. That is a matter which was settled by authorities which were not called to our attention in the course of the argument. In *Butler and Baker's Case* (1), it is said: "The same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal *in pais*, and by that the property and interest will be devested." That case was decided in the year 1590. Exactly 100 years afterwards, in *Thompson* v. *Leach* (2), the question again arose, and was decided by the Queen's Bench against the opinion of *Ventris*, J. But that opinion so given was reversed afterwards by the House of Lords on a writ of error (3), and that was a very strong case indeed, because the effect of the surrender was to bar a contingent remainder, which would otherwise have become vested by the birth of the son, which happened before the assent of the surrenderee. In *Siggers* v. *Evans*, 1855 (4), the old authorities are reviewed, and Lord *Campbell* formulated the principle which I have indicated above. Under these circumstances it seems to me that both the beneficial and the legal interest in these consols passed to the Defendant in this suit. If both the legal and beneficial interest were intended to pass and did pass, I do not see how any question of trust could arise.

The result, therefore, is, that I agree with the decision at which the learned Judge in the Court below has arrived, and I think that that decision must be affirmed, and this appeal dismissed with costs.

(1) 3 Rep. 26 b.
(2) 2 Vent. 198.
(3) 2 Vent. 208.
(4) 5 E. & B. 367.

COTTON, L.J.:—

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The Plaintiff Mrs. *Standing* commenced this action in order to have it declared that the Defendant *Bowring* was a trustee for her of a sum of £6000 Consols.

The facts have been sufficiently stated by the Lord Chancellor. Though the Defendant was the nephew of the first husband of the Plaintiff, she was not *in loco parentis* to him, and the rule is well settled that where there is a transfer by a person into his own name jointly with that of a person who is not his child, or his adopted child, then there is *primâ facie* a resulting trust for the transferor. But that is a presumption capable of being rebutted by shewing that at the time the transferor intended a benefit to the transferee, and in the present case there is ample evidence that at the time of the transfer, and for some time previously, the Plaintiff intended to confer a benefit by this transfer on her late husband's godson. In fact, when she desired to get the stock back again, what she said shewed that she had originally intended to confer a benefit on the Defendant *Bowring*, but that in consequence of something he had done which had displeased her, she desired, if possible, to take back that which she had intended to be a benefit to him. That being so, the presumption that there would be a resulting trust for her is entirely rebutted, and it must be taken here, that although she did not intend *Bowring* to have any right to the dividends during her lifetime, she intended to give him a beneficial interest in the stock, and that on her death, as he survived her, the legal right must prevail, and he must take the property for his own benefit.

Another question, which has been already referred to by the Lord Chancellor, was raised in this case, viz., whether anything vested in *Bowring*, because until he was informed that the Plaintiff, Mrs. *Standing*, desired to get back this stock, he never was informed of the transfer. Now the transfer of stock in the public funds is regulated by Act of Parliament, and the statutory mode of transfer is by an instrument in the books of the *Bank of England* to be signed by the transferor. That was done here, and although the *National Debt Act*, 1870, recognises an acceptance by the transferee, yet it does not make that acceptance necessary or essential, for sect. 22 provides that "the person to whom a transfer

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is so made may, if he thinks fit, underwrite his acceptance thereof." Now, I take the rule of law to be that where there is a transfer of property to a person, even although it carries with it some obligations which may be onerous, it vests in him at once before he knows of the transfer, subject to his right when informed of it to say, if he pleases, "I will not take it." When informed of it he may repudiate it, but it vests in him until he so repudiates it. *Siggers* v. *Evans* (1), referred to by the Lord Chancellor, is a late case to that effect, in which the earlier authorities are reviewed, and one very remarkable case, *Smith* v. *Wheeler* (2), is quoted at p. 382, and also at greater length in *Small* v. *Marwood* (3), where the right of the Crown was defeated by an assignment made before that right accrued, but not communicated to the assignee until after that right had accrued. It was held that although the assignee knew nothing of the assignment, it became effectual at once, so as to defeat the title of the Crown, which accrued before the knowledge was communicated to the assignee, and therefore of course before acceptance by the assignee. In my opinion therefore the appeal fails.

LINDLEY, L.J.:—

The right of the Plaintiff to have the £6000 Consols in question in this action retransferred to her depends upon the legal effect of her own conduct on the 3rd of November, 1880. On that day she caused £6000 Consols, then belonging to her, to be transferred in the books of the *Bank of England* into the joint names of herself and the Defendant, and the evidence shews that she did this deliberately, after being advised that she would not be able to rescind the transaction, and clearly at the time intending the Defendant to keep the Consols for his own benefit after her death in the event of his surviving her, which event was highly probable. The transfer was made without consideration and without any knowledge on the part of the Defendant of what was done. She now wishes to have the Consols retransferred into her own name, and the question is whether she is entitled to have them back.

(1) 5 E. & B. 367. (2) 1 Vent. 128.
(3) 9 B. & C. 300, 306.

The transfer of stock and the rights of stockholders (*i.e.*, of persons in whose names the stock is standing) depends partly on general principles and partly on the provisions of the *National Debt Act*, 1870 (33 & 34 Vict. c. 71). By this statute a transferee of stock *primâ facie* acquires the legal title to it; and if his transferor had himself a good title to the stock and a right to transfer it, and has transferred it, the transfer cannot be treated by him or by the *Bank of England* as a nullity. Nor is there any method by which the transferor can get back his stock without the concurrence of the transferee or some order of a competent Court requiring him to execute a retransfer. Formal acceptance by the transferee of the transfer to him is not necessary to complete his legal title (see sect. 22). The Defendant in this case declines to retransfer the stock, and the question is therefore reduced to this—viz., whether there are any grounds on which the Court can order him to do so, or make him account to the Plaintiff for the value of the stock which she seeks to get back from him.

The Plaintiff in her statement of claim and in the Court below rested her case on equitable grounds, and sought to establish a trust in her favour. But the only trust which was consistent with the evidence was a trust to pay her the income of the Consols for the joint lives of herself and the Defendant. This trust was not in controversy, but is not sufficient for the Plaintiff's purpose. No trust will suffice short of an absolute trust for herself. But it is impossible to impose such a trust on the Defendant, when the evidence conclusively shews that she never intended to create any trust of the kind. Trusts are neither created nor implied by law to defeat the intentions of donors or settlors; they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied. It appears to me there are no equitable as distinguished from legal grounds on which the Plaintiff can obtain relief.

It was, however, contended before us that the legal title had not passed to the Defendant; that, as he never knew of the transfer or assented to it until after he was requested to retransfer the stock, the gift of it to him was really incomplete, and that the

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legal title to it was still in the Plaintiff. I am of opinion, however, that this is not the case. An incomplete gift can, of course, be revoked by the donor at any time; and I believe that by the civil law and the laws of some, if not all, foreign countries founded upon it, a gift is incomplete until the donee has assented to it, or at least until he has been informed of it and has tacitly assented to it by not objecting to it. But I have not been able to ascertain that this doctrine is ever applied where, as in this case, the donor has put the thing given out of his own power, and has placed it in such a position that he can only get the thing back with the concurrence of the donee. When once the possession is changed it is too late to revoke; but whether possession is changed until the donee has assented to the change is not so clear. However this may be on general principles or by the civil law, our own law as to the necessity of assent to gifts seems settled by *Butler and Baker's Case* (1), *Thompson* v. *Leach* (2), in the House of Lords, and *Siggers* v. *Evans* (3). The older authorities were carefully examined in this last case by Lord *Campbell*, and I take it now to be settled, that although a donee may dissent from and thereby render null a gift to him, yet that a gift to him of property, whether real or personal, by deed, vests the property in him subject to his dissent. The same principle appears to me to be applicable to transfers of stock in the books of the *Bank of England*. If the assent of the transferee were necessary to complete his legal title, the Legislature would not have made his formal acceptance of a transfer to him unnecessary, as it has done by the section to which I have already alluded. It would be very embarrassing to the *Bank of England* if acceptance of a transfer were necessary, and yet that no evidence of it in their books should be so. For these reasons I am of opinion that the Plaintiff's attempted revocation of her gift was too late, and that the appeal fails, and ought to be dismissed with costs.

Solicitors: *Sandom, Kersey, & Knight; Bell, Brodrick, & Gray*, agents for *Linton & Kenshole, Cardiff*.

(1) 3 Rep. 25 a. (2) 2 Vent. 198, 208.
(3) 5 E. & B. 367.

H. C. J.

In re HAMILTON (INFANTS).

C. A. 1885 Dec. 4, 16, 21.

Infant—Maintenance—Charge on Infants' Real Estate.

Two infants were entitled to successive estates tail in remainder after the life estate of their father, which life estate had been sold under his bankruptcy. There being no income applicable to the maintenance of the infants, an application was made on their behalf that a yearly sum might be allowed for that purpose, and borrowed on the security of a mortgage or charge on the real estate to which they were entitled as above, the amount for which the charge was to be given including the premiums on the insurance requisite for the protection of the lender:—

Held, that an order sanctioning the scheme could not be made, and that the principle of *In re Howarth* (1) would not support it, for that, although judgment might be recovered against the infants for necessaries supplied to them, it could not be recovered for premiums on the policies, and, moreover, judgment could not be recovered against one infant for necessaries supplied to the other, and a judgment would not charge the estates of the infants, inasmuch as those estates were so circumstanced that they could not be delivered in execution.

UNDER the will of Colonel *Hamilton*, who died in 1858, real estate in *England* and *Ireland* stood limited, in the events which had happened, to the use of *J. H. J. Hamilton* for life, with remainder to his sons successively in tail male, with remainder to his daughters successively in tail male; and by another will certain other estates were devised to the same uses. *J. H. J. Hamilton* married in 1875. There were two children of the marriage, a son, born in 1876, and a daughter in 1878. In 1884, *Hamilton* was adjudicated bankrupt, and his life estate was sold in the bankruptcy. On the 17th of January, 1885, Mrs. *Hamilton* obtained a decree for judicial separation, and the custody of the children was given to her. Her only present income was £100 a year, payable by her father under a covenant in her marriage settlement. The rental of the English estates devised by Col. *Hamilton's* will was about £1450, that of the Irish estates about £1000, and the rental of the estates devised by the other will was about £460. The father was doing nothing towards the support of the infants, and there was no income applicable to their maintenance.

(1) Law Rep. 8 Ch. 415.

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A case was submitted to an actuary in March, 1885, to calculate what sum should be paid at the death of the tenant for life in consideration of £200 a year until the first of the children attained twenty-one, provided that at least one of the children should be living at the death of the father and attain twenty-one, and that if the son died under twenty-one, he should leave no issue him surviving; if neither child survived the father and attained twenty-one, or if the son died under twenty-one, leaving issue, the lender to lose his money; the calculations to be made on the understanding that the infants' lives were insured.

An eminent actuary advised upon this case, that an insurance company might be found to undertake the risk for £13,500, payable on the father's death, subject to the above contingencies; the sum to carry interest at £5 per cent. from the death of the father until one of the children attained majority, in the event of the father's dying before either attained twenty-one.

In April, 1885, a summons was taken out on behalf of the infants by their maternal grandfather as their next friend, asking that £200 a year from the 1st of April, 1885, might be allowed for their maintenance, and that it might be borrowed from an insurance office on terms to be sanctioned by the Judge, and that the sums advanced by the office might be secured by a mortgage or charge upon the real estate of which the infants were successively tenants in tail in remainder subject to the life estate of their father.

No insurance office could be found that would entertain the proposal, but an individual was willing to secure the £200 a year on the terms mentioned in the case and the actuary's opinion thereon, if security could be given on the real estate.

The application was heard by *Kay*, J., in Chambers, and dismissed by him on the ground of want of jurisdiction to charge an infant's real estate with his future maintenance. His Lordship certified that he did not require the case to be further argued. The infants appealed.

Swinfen Eady, for the appeal:—

According to *In re Howarth* (1) the Court can make an order

(1) Law Rep. 8 Ch. 415.

of this nature on the ground that an action might be brought against the infants for necessaries supplied to them, and that the judgment in that action would charge their real estate. *Ring* v. *Jarman* is referred to by *Malins*, V.C., in *De Witte* v. *Palin* (1), as authorizing an order for charging the maintenance of an infant on his contingent reversionary property. The Court can bar the estate tail, for by the *Judgment Act* of 1864 (27 & 28 Vict. c. 112), s. 2, the order would have the force of a judgment, and by sect. 4, the judgment creditor can obtain an order for sale of the debtor's interest in land, which order would direct the debtor to convey. Then by the *Trustee Extension Act*, 1852, s. 1, the infant is a trustee within the meaning of the *Trustee Acts*, and by the *Trustee Act*, 1850, sect. 2, a direction to any person to convey means the execution by such person of every proper assurance, including the acts to be performed by tenants in tail. By sect. 14 of the *Judicature Act*, 1884 (47 & 48 Vict. c. 61), the Court can order any instrument which a person refuses to execute, to be executed by some person in his stead.

[FRY, L.J.:—How can we exercise the power of the protector?]

The Court, at all events, can create base fees, and the charge can be enforced against the first that comes into possession.

[LINDLEY, L.J.:—If we think that we can make an order which will have the effect of charging the base fee in the property, we shall be disposed to make it. We will further consider the case before next Monday, and in the meantime it may be ascertained whether the mortgagee will be willing to accept a security on a base fee in remainder.]

Dec. 21. *Swinfen Eady* stated that the proposed lender was willing to make the advance if the Court considered that it could convert the estates tail of the infants into base fees and charge the £13,500 on those base fees.

LINDLEY, L.J.:—

I have looked through the cases and the Acts which have been cited and have come with regret to the conclusion that we cannot

(1) Law Rep. 14 Eq. 251, 252.

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safely make any order in this case. The object is to obtain maintenance for two infants who are entitled in succession to estates tail in remainder expectant on the decease of their father. The father, who is tenant for life, has become bankrupt; his life estate has been sold under his bankruptcy: he is now abroad, and is contributing nothing to the maintenance of his children; the wife has obtained a sentence of judicial separation, and the custody of the children has been given to her. It is proposed to make an arrangement under which £200 a year is to be provided for their maintenance until one of them attains twenty-one, and the payment of the consideration for this provision, including the premium on a policy of insurance for the security of the lender, is proposed to be charged on their interests in the devised estates. We have every wish to give effect to an arrangement which would provide maintenance for the infants, but we cannot see our way to making any order for that purpose. We hoped at first that *In re Howarth* (1) might help us. In that case the Court charged the expenses of the past maintenance of an infant on the *corpus* of an estate to which he was entitled in fee simple in possession. This was done on the principle that any one who maintained the infant could obtain a judgment against him which would charge his real estate, and that the order made substantially came to the same thing. We thought at first that by a subtle application of the same principle we could find a way of creating a charge in the present case. But we cannot make an order having a wider effect than a judgment at law against the infant would have. Now, though an action could be brought for necessaries supplied to the infants, no action would lie against them for the premiums on the policy of insurance, and those premiums form a part of the sum which it is sought to charge. This objection appears to me to be fatal. Then again, by 27 & 28 Vict. c. 112, s. 1, no judgment is to affect any land until such land has been actually delivered in execution. When it has been so delivered, but not before, the Court under sect. 4 can direct a sale of the debtor's interest in the land. Now, in the present case, the land cannot be delivered in execution by the sheriff, the estate of the infants being only an estate in remainder, and a Court of Equity

(1) Law Rep. 8 Ch. 415.

could not during the continuance of the life estate deliver it in execution by the appointment of a receiver. We should therefore have to invent some new form of execution before we could make an order binding the estates. The difficulties in the way of making the order asked for are such as cannot be overcome in any way that we have been able to discover, and I am afraid that the only way out of the difficulty is to apply for a private Act of Parliament.

FRY, L.J.:—

I am obliged, though reluctantly, to come to the same conclusion. The difficulties in the way of applying to the present case the theory of an action for necessaries, and a judgment therein, appear to me insuperable. In addition to what Lord Justice *Lindley* has noticed, there is another objection. The theory is, that the charge could be enforced against the estate of the child who first becomes entitled in possession. But the amount of his liability in the supposed action would be very different from the £13,500 which it is now sought to charge. He would be liable only for what had been expended for his own maintenance. The principle of *In re Howarth* (1) therefore does not cover the case. The case of *Ring* v. *Jarman* (2), the orders in which have been furnished to us, does not appear to me to help the application. There the testator had devised lands to trustees upon trust during a period of twenty-one years to invest the rents in the purchase of land, and in the meantime to accumulate them, and at the end of the twenty-one years the trustees were to convey the devised and the purchased estates in fee to the person who should then answer the description of the testator's heir general, and were to pay and transfer to the same person any accumulations which remained not invested in land. The plaintiff was the testator's heir general, and had one child, a daughter. If the plaintiff survived the twenty-one years he would be absolutely entitled, if he did not survive that period but his daughter did, it was, under the circumstances of the family, considered practically certain that at the expiration of

(1) Law Rep. 8 Ch. 415.

(2) Referred to in *De Witte* v. *Palin*, Law Rep. 14 Eq. 252. The will is given Law Rep. 14 Eq. 357.

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the period she would answer the description of the testator's heir general. Under these circumstances, upon the application of the plaintiff, the Court made an order directing the trustees to pay out of the rents an allowance of £200 a year for the daughter's maintenance, and of the yearly premium of £126 on a policy of insurance for £8000, payable in the event of both the father and daughter dying within the twenty-one years. The circumstances of that case were entirely different from those of the one now before us, and I do not think that it at all helps the present application. I therefore, with regret, come to the same conclusion as Lord Justice *Lindley*.

Solicitors: *Abbott, Jenkins, & Abbott.*

H. C. J.

C. A. 1885 CHITTY, J. *Nov.* 3, 9. C. A. *Dec.* 18.

In re GALLAND.

[1885 G. 2131.]

Solicitor and Client—Lien—Delivery up of Papers—Rules of Supreme Court, 1883, *Ord.* L., *r.* 8—*Promotion Expenses—Statutory Debt.*

The Court has jurisdiction, upon payment into Court, or giving security for a sum sufficient to answer the solicitor's demand, to order before taxation delivery up by a solicitor of the client's papers, where retention by the solicitor of the papers on which he claims a lien would embarrass the client in the prosecution or defence of pending actions.

Quære (*per Lindley*, L.J.), whether the jurisdiction is not extended by Order L., r. 8.

This lien is confined to what is due to the solicitor in that character, and does not extend to general debts. Accordingly the lien of the solicitor of a railway company for his costs does not include costs incurred in relation to the promotion of the company before incorporation, such costs by the usual clause in the Act having been made a statutory debt to be paid by the company.

IN September, 1880, Mr. *Galland* was appointed, jointly with *F. Lowe*, of *Hull*, since deceased, as solicitor of the *Hull, Barnsley, and West Riding Junction Railway and Dock Company* until (as the company alleged) the opening of the undertaking of the company.

Lowe died in April, 1884, and his partner, *J. S. Moss*, the

present solicitor of the company, was appointed in his stead. On the 26th of March, 1885, at a special meeting of the Board, a resolution was passed "that upon consideration of Mr. *Galland's* letters and others matters the directors are of opinion that his connection with the company as one of the solicitors is no longer desirable in the interests of the company, and that Mr. *Galland* be invited to resign the appointment conferred upon him by the directors on the 13th of September, 1880."

Mr. *Galland* refused to resign, and as the time for opening the undertaking was near at hand no further steps were taken to put an end to the appointment.

The undertaking was opened on the 27th of July, and on the 5th of September, 1885, pursuant to a resolution of the company of the 3rd of September, Mr. *Galland* was requested to hand over all papers relating to the company's business, whether finished or unfinished, to *Moss*, who had been appointed sole solicitor of the company.

Mr. *Galland* declined to comply with this request, and stated that he should continue to transact the business of the company, and would not hand over the documents in his possession.

The company had accordingly, on the 1st of October, 1885, applied by summons that upon payment into Court of such a sum as the Court might think fit to answer the amount which might be found due from the company to *Galland*, *Galland* might be ordered within fourteen days after such payment into Court, or subsequently to such payment in, within four days after service of the order to be made thereon, to deliver upon oath to the company or to their solicitor, all deeds, books, papers and writings in his custody or power belonging to the applicant company. The summons also applied for the delivery by *Galland* of his bill of fees and disbursements claimed to be due to and payable to him as solicitor of the company, and for taxation of the bill when delivered.

In the affidavits in support of the summons it was stated that there was a large amount of conveyancing business of the company remaining unfinished, that proceedings were threatened for breach of agreements which were in the hands of *Galland*, and

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various legal proceedings in actions and suits in which the company were concerned were pending, and that such conveyancing business and legal proceedings required immediate attention, particularly as regarded an action in which there was an appeal set down for trial, and which might be reached early in the present sittings, but the company's solicitor was unable to attend to such business efficiently in consequence of the papers remaining in the possession of *Galland*, who refused to deliver over the same. It was also apprehended that the interests of the company might be seriously and injuriously affected by the conduct of *Galland*.

Mr. *Galland* in his affidavit in opposition stated that he had a large claim upon the company for costs and expenses incurred in reference to the promotion of the company, prior to the Act obtained by the company in 1880, which costs by the terms of their Act were payable by the company. He denied that any damage could happen to the company unless they wilfully suspended him from the ordinary discharge of his duty as solicitor to the company, and he protested against being responsible for the consequences of having been compelled in many cases to suspend active proceedings for completion of the purchases which from the beginning had been placed in his care by the board as solicitor to the company. He also raised the case that he was entitled to continue to act as solicitor of the company, and that they could not cease to employ him, but this point was disposed of in Chambers as untenable, and was not argued in Court.

It appeared that *Galland's* bills of costs for business transacted for the company had been settled up to June, 1884.

The summons came on for hearing before Mr. Justice *Chitty* on the 3rd of November, 1885.

Phipson Beale, in support of the summons :—

The jurisdiction of the Court to order papers to be delivered up by a solicitor upon having the amount due to him from the client secured by payment into Court cannot now be disputed. Even in the earlier cases it was admitted that where there was a "pressing necessity" for production, the Court would take care that the

solicitor's lien should not occasion the loss to the client of his property: *Clutton* v. *Pardon* (1); *Richards* v. *Platel* (2); *In re Murray* (3). This right of the client "as a matter almost of course" to have his papers delivered over to him on payment of the amount claimed into Court, was distinctly recognised in *Re Bevan and Whitting* (4); *Re Jewitt* (5); *Republic of Costa Rica* v. *Erlanger* (6).

Russell Roberts, contrà:—

The result of the cases shews that a solicitor who has been discharged by his client cannot be compelled to afford him any facilities even as to pending matters, and may, by withholding papers on which he claims a lien, embarrass the client in order to force him to pay what is due: *In re Faithfull* (7); *In re Capital Fire Insurance Association* (8); *Lord* v. *Wormleighton* (9); *Bozon* v. *Bolland* (10). There is no distinction between the case of a solicitor claiming a lien on the papers of his client and the case of any other creditor who holds a security for his debt: *Richards* v. *Platel* (11), and it would be contrary to the whole course of proceeding in this Court to compel a creditor to part with his security till he has received his money: *Postlethwaite* v. *Blythe* (12); *Newington Local Board* v. *Eldridge* (13).

There must be "pressing necessity," and some special case must be specially made and brought before the Court as a ground for ordering a solicitor to deliver up papers before payment. This principle was affirmed by Lord *Cottenham* in *Richards* v. *Platel*, disapproving the *dictum* of Lord *Eldon* in *Clutton* v. *Pardon*; and there was no change in the practice until *Re Jewitt* and *Re Bevan and Whitting*, which cases do not appear to have been argued, and were disapproved of as being contrary to the general rule by Vice-Chancellor *Malins* in *In re Faithfull*. And in *Re Bevan and Whitting*, moreover, there was no

(1) T. & R. 301.
(2) Cr. & Ph. 79.
(3) 1 Russ. 519.
(4) 33 Beav. 439.
(5) 34 Beav. 22.
(6) W. N. (1879) p. 7.
(7) Law Rep. 6 Eq. 325.
(8) 24 Ch. D. 408.
(9) Jac. 580.
(10) 4 My. & Cr. 354.
(11) Cr. & Ph. 82, 83.
(12) 2 Sw. 256.
(13) 12 Ch. D. 349.

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constat that anything was due to the solicitor from the client. The cases in which delivery has been ordered are those in which the papers sought to be retained belong to an estate which is being administered by the Court, and the solicitor has not been allowed to obstruct the course of the Court by retaining papers necessary for carrying on the proceedings: *Belaney* v. *Ffrench* (1); *In re Boughton* (2). And such orders have only been made in the action itself when the Court has had the matter before it, and can judge how far the action will be embarrassed by allowing the solicitor to retain the papers.

[CHITTY, J., referred to *Morgan's* Chan. Ord. (3) and *Seton* on Decrees (4), in which *Re Jewitt* (5) and *Re Bevan and Whitting* (6) were cited without disapproval.]

Beale, in reply.

CHITTY, J. (after stating the question, proceeded):—

Mr. *Galland* certainly was employed as the solicitor for the railway company, and has done their business up to within a recent time. His case upon his affidavits is that he was employed under the terms of a contract, the effect of which was that he, once solicitor, was entitled to remain solicitor, notwithstanding that the company sought to discharge him. That point was put before me in Chambers, but, I think with great prudence, it has not been attempted to repeat the argument in Court. A solicitor is not an officer in the sense of holding a freehold office, and a client can discharge him at any moment that he may think fit. If there is a contract between the solicitor and the client for the employment of the solicitor for a particular business or a particular period, and then there is a breach of that contract, the solicitor will have his remedy in the ordinary way, but he cannot insist on acting for the client against the client's will. Now, it is quite plain that Mr. *Galland* is no longer employed by the company, and the company, I understand, say that the period for which he was employed has expired. He, on the other hand, says

(1) Law Rep. 8 Ch. 918.
(2) 23 Ch. D. 169.
(3) 6th Ed. p. 9.
(4) 4th Ed. pp. 640, 641.
(5) 34 Beav. 22.
(6) 33 Beav. 439.

it has not; but it is quite certain that the company decline to employ him any longer, and that is the ground of the present summons. From the affidavit of the secretary it appears that the company will suffer very considerable injury if these papers are not delivered; and the question is whether there is not, within the language of Lord *Eldon*, in *Clutton* v. *Pardon* (1), such a pressing necessity for the papers as to render it right for the Court to exercise its jurisdiction.

There is no affidavit of Mr. *Galland* denying what the secretary says. On the contrary, Mr. *Galland's* affidavit really points to the same conclusion by saying that there are a number of incomplete purchases. At least to that extent it corroborates the secretary. No doubt it takes a different view as to why there has been delay, and imputes it to the directors, and not to himself. That is immaterial, to my mind, upon the particular point. I think that the taxation will occupy a considerable time, and that there is a case shewn that the interests of the company will be very seriously affected if the papers are not obtained speedily.

Now, that being so, I have to consider what the authorities are on the subject, and I very respectfully say that I concur with Lord *Cottenham* in what he states in *Richards* v. *Platel* (2), that the solicitor's lien "existing by the custom of trade or the practice of a profession, is equivalent to a contract." It is not quite the same thing, but for ordinary purposes it is treated as equivalent to a contract, and the solicitor is not to be deprived of his lien. But Lord *Cottenham* himself in that case evidently considered that the Court had the jurisdiction, where the case warranted it, to make an order for the handing out of the papers or some of the papers for a particular purpose in order to prevent great hardship being inflicted upon a client. At page 83 he says: "It would undoubtedly be the duty of the Court to take care that the solicitor's lien should not occasion the loss of the property." I think, therefore, when the two cases of *Clutton* v. *Pardon*, before Lord *Eldon*, and *Richards* v. *Platel*, are put together, there is no ground for saying that in the substantial result there is any difference between the two Lord Chancellors. I understand Lord *Eldon*, in what he said as to ordering papers to be delivered

(1) T. & R. 301. (2) Cr. & Ph. 79, 83.

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when the client had a pressing necessity for them, not, as was suggested, to have been making a casual observation, but to have been stating what he considered to be the course of the Court, and having laid down that proposition, he proceeds then to analyse the circumstances of the case with a view to ascertaining whether the particular case comes within the principle.

Now I have gone through those two authorities because they have been cited and commented upon at the bar; but there are two reported cases before Lord *Romilly* which I will proceed to notice. The first is *Re Bevan and Whitting* (1), which has no bearing on the present case except for the *dictum* of Lord *Romilly*. In that case it appeared by the admission of the solicitor that there was nothing due. Lord *Westbury*, upon appeal, affirmed the order for delivery, but added that if it should be found, contrary to the admission of the solicitor, that there was something due in the result, the papers should be re-delivered. The *dictum* of Lord *Romilly* is in these words: "Where a solicitor sends in his bill, and claims a stated balance to be due to him, the client is entitled, as a matter almost of course, to have his papers delivered over to him on payment of the amount claimed into Court." Now Lord *Romilly* was very conversant with these matters, because from the course of practice during the time that he was Master of the Rolls nearly all the taxation cases came before him; and I take his *dictum* as one of very great value, and, at least, shewing what he considered to be, from his own experience, the course of the Court. He says it is almost a matter of course; in this respect, I quite agree, going beyond what Lord *Eldon* laid down, and apparently beyond what Lord *Cottenham* was prepared to hold; and this was in 1864, when he had been Master of the Rolls for a considerable period of time; and in that *dictum* I have no hesitation in saying that he was there stating the practice upon which he had acted for several years.

The other case is that of *Re Jewitt* (2), and, there, there was an order made for the solicitor, pending the taxation of the bill, to deliver over the client's papers on the client's undertaking to produce them, and giving security. Now Lord *Romilly* again, when he decides the case, states his practice: "The course I

(1) 33 Beav. 439. (2) 34 Beav. 22.

adopt in all these cases is this. Where a sum is claimed by a solicitor to be due to him, and some delay occurs in the taxation, imputable to the fault of no one, I order the papers to be delivered over on the amount being secured and on an undertaking to produce them as required in the course of the taxation. The case has been before the Court on several occasions." What he means by that is that he has had several applications of a similar nature made to him, and that has been his course. He speaks there of the delay in the taxation imputable to no one; but evidently that is not the principle upon which he is acting: it is that it is considered and held by him that the Court has jurisdiction, not to take away the solicitor's lien, but to prevent injury to the client, on giving the solicitor such a security as covers the whole of his demand in the shape of money brought into Court, which affords him complete security, and of course the solicitor is to have all access to the papers, which may be of importance to him to make out his bill of costs, or, if he has already made out the bill, to justify some of the charges which are found in it. Now *Re Jewitt* (1) is stated in all the text-books: in *Seton* on Decrees (2), in the last edition of *Morgan* and *Wurtzburg* on Costs (3), and in the last edition of *Morgan's* Chancery Orders (4), without any comment being made upon it, and it seems to me that it has been treated by the profession as the rule of the Court; and, speaking for myself, I am satisfied that, in circumstances such as occur in the case before me, orders of the kind I am asked to make have frequently been made. No doubt Lord *Romilly* expressed in *Re Bevan and Whitting* (5) his astonishment that the solicitor should resist, but I am not in a position to say that a solicitor is not entitled to make the best he can of the lien which the law gives him for the purpose of compelling payment. The Court in the exercise of its discretion says that if the solicitor is completely secured, and it takes care not to enter upon a matter of controversy as to the amount, but to give him the amount which he claims and a sum to answer the costs of the taxation, it is inequitable that he should be allowed to embarrass the client further by holding the papers.

(1) 34 Beav. 22.
(2) 4th Ed. pp. 640, 641.
(3) Page 443.
(4) 6th Ed. p. 9.
(5) 33 Beav. 439.

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The order will be made, and Mr. *Galland* must make an affidavit stating what demand he has against the company, and what demand he has against the promoters, distinguishing the costs incurred before and after incorporation of the company.

Nov. 9. Mr. *Galland* having made the required affidavit, the matter again came before the Court.

CHITTY, J., held that Mr. *Galland's* claim for costs before incorporation was at the utmost a statutory claim for a debt, and did not turn him *ab initio* or retrospectively into the solicitor of the company, and accordingly that he had no lien in respect of this claim on the papers of the company which had come into existence subsequently. As Mr. *Lowe* and Mr. *Galland* had divided the work between them, either with or without an arrangement with the company, and sent in separate bills of costs, the lien would not extend to costs which on the face of the bills appeared to have been primarily those of Mr. *Lowe*. It was stated by Mr. *Galland* that the amount claimed in his bills "does not exceed £3000." This was not quite so definite as he should like to see: it should have been "not less than £3000." On payment into Court of the £3000, with £100 for the costs of taxation and £50 for the costs of the proceedings on the summons, the order would be made in the terms of the summons.

C. A. From this decision Mr. *Galland* appealed. The appeal was heard on the 18th of November, 1885.

Ince, Q.C., and *Russell Roberts*, in support of the appeal:—

[The argument upon the right of Mr. *Galland* to retain the papers until actual payment of the amount claimed to be due to him is not reported, being to the same effect as in the Court below, and an offer made by the Respondents that £1650 of the £3150 in Court should be paid to Mr. *Galland*, on his delivering the papers and undertaking to repay it if on taxation of his bill a less amount should be found to be due, was accepted.]

We say that a sufficient amount has not been deposited to meet Mr. *Galland's* claim, as his lien extends to his costs incurred in the promotion of the company. Sect. 161 of the Act

(*Hull, Barnsley, and West Riding Junction Railway and Dock Act*, 1880), provides that "all the costs, charges, and expenses of and incident to the preparing and applying for, and the obtaining and passing of this Act, or otherwise in relation thereto, shall be paid by the company." The retainer of Mr. *Galland* by the promoters, who by sect. 4 are incorporated into the company, is the retainer by the company, and by the effect of sect. 161 makes them liable for all costs incurred prior to incorporation.

The joint appointment of *Galland* with *Lowe* as solicitors of the company established a *quasi* partnership between them, so as to give *Galland* a lien for all costs due from the company to *Lowe*.

Macnaghten, Q.C., and *Phipson Beale*, for the company, were not called on.

LINDLEY, L.J.:—

It has become unnecessary to decide the question whether the Court has jurisdiction to order a solicitor to deliver up papers on payment into Court of sufficient to secure him, and therefore I say no more about it than this, that there is evidently jurisdiction to do it in some cases, and when the point has to be decided the bearing of Order L., r. 8, will have to be considered. I do not say now that it has, but I say it may be that it has, removed all difficulty in the matter.

Then as to the other points: with regard to the amount which is to be paid into Court, it is contended that the *Hull and Barnsley Company* are debtors to Mr. *Galland* for a sum of £10,000 incurred in the formation of the company, and that, therefore, he has a lien upon the papers of the company for that sum. Sect. 161 of the incorporating Act would probably enable Mr. *Galland* to maintain an action of debt against the company for the amount of his costs, but we cannot help seeing that these costs have not become due to him from the company as his clients. The right which he may have to sue them is under the statute, and the statute gives him no lien at all. There is this also to be considered, that his own clients, the promoters, as

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distinguished from the company, are liable on their undertaking, and he has against them whatever remedy a solicitor has against his clients. Whatever that may be we do not touch it. But it is for him to shew that the statute has not only converted the company into his debtor, but has given him a lien, and this he cannot maintain by reason of the want of relation of solicitor and client. It appears to me that this is the short and conclusive answer to this case on that point.

With respect to the claim of Mr. *Galland* to be entitled to half of the costs due to *Lowe* under the company's retainer, it is, I think, quite clear that there was no joint retainer of them as partners, but that each was separately retained, and each is entitled to payment of his separate bill of costs, and although there may have been an arrangement between Mr. *Galland* and Mr. *Lowe* as to the way they should share the profits, that cannot, as it appears to me, increase Mr. *Galland's* rights against the company, which are those of a separate solicitor, and he cannot have a lien on the papers of the company for what is due to *Lowe*. Upon those points Mr. *Galland* fails, and there will be no order except the consent order for payment out of Court to Mr. *Galland*.

FRY, L.J.:—

I am of the same opinion. The lien of a solicitor does not extend to all sums of moneys which may be due to him from his client. It does not, to use the language of Sir *Thomas Plumer*, M.R., in *Worrall* v. *Johnson* (1), extend to general debts, but only to what is due to him in the character of attorney. It appears to me that this debt of £10,000, assuming it to be a debt due from the railway company to Mr. *Galland* in respect of the costs of the promoters, is not a sum due from them as from a client to a solicitor; but is a sum due, if at all, under the statute, and not a debt due from a client to a solicitor. It is therefore impossible that he can have a right of retainer in respect of that sum.

With regard to the other point, it appears to me clear that

(1) 2 Jac. & W. 214, 218.

Messrs. *Lowe* and *Galland* were acting separately. The mere fact that they have had separate bills of costs, although they had some arrangement between them as to sharing the costs, is conclusive to my mind to shew that there was no joint retainer of those gentlemen, and that, therefore, Mr. *Galland* can have no lien on these papers for the sum in question.

Solicitors: *A. R. Oldman*, for *Lowe & Moss, Hull; Brooksbank & Galland.*

F. G. A. W.

V.-C. B.
1885
Dec. 18.

In re HUNT'S TRUSTS.

Power of Appointment—Will—Residuary Gift.

A testatrix having a testamentary power of appointment over a trust fund in favour of her children only, purported by her will to appoint to three of her children, including *F.* and *B.*, one-fourth each, and the remaining fourth to a grandchild, not an object of the power: and "all the rest, residue, and remainder of my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, and over which I have any power of disposal by this my will, I give and bequeath the same unto and equally between my said sons *F.* and *B.* share and share alike":—

Held, that the residuary gift operated as an appointment to *F.* and *B.* of the one-fourth badly appointed to the grandchild.

PETITION.

By the settlement made on the marriage of *Thomas Maxwell Hunt* with *Elizabeth Collinson*, dated the 9th of June, 1815, a fund was settled upon trusts for the husband and wife, and after the death of the survivor of them upon trust for the children of the marriage as the husband and wife should jointly appoint and as the survivor should by deed or will appoint, and in default of appointment for the children equally.

There were several children of the marriage.

T. M. Hunt died in 1863 without having concurred with his wife in exercising the joint power of appointment.

Mrs. *Hunt*, by her will, dated the 25th of June, 1870, after reciting the settlement and the power of appointment vested in her, and that the trust fund then consisted of £8623 13*s.* 1*d.* Bank £3 per cent. Reduced Annuities, purported to appoint "the said sum of £8623 13*s.* 1*d.* Reduced Annuities" as follows: after appointing a sum of £500 to her daughter, Mrs. *Little*, she appointed the residue of the fund, as to one-fourth part, to her son *Edward*, "but in the event of my said son *Edward* not having been heard of, or in *England*, at the time of my decease, I appoint and bequeath the same unto my grandson, *Frederick William Hunt*, to and for his own absolute use and benefit:" As to one other fourth to her son *Frederick*; as to one other fourth to her son *Benjamin*; and as to the remaining fourth to her daughter Mrs. *Little*, during her life for her separate use, and, after her

decease, upon trust for her children; and in case of her dying without leaving children, then in trust for her, the testatrix's, said sons *Frederick* and *Benjamin* equally.

The testatrix then proceeded as follows:—"All the rest, residue, and remainder of my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, and over which I have any power of disposal by this my will, I give and bequeath the same unto and equally between my said sons *Frederick Hunt* and *Benjamin Hunt*, share and share alike, as tenants in common and not as joint tenants."

The testatrix died in 1877. At the time of her death her son *Edward* had not been heard of since 1861.

The three fourth shares appointed to the daughter Mrs. *Little* and the sons *Frederick* and *Benjamin* had been duly paid.

The testatrix's grandson, *Frederick William Hunt*, not being an object of the power, the appointment of one-fourth share of the trust fund purported to be made to him by her will failed, and a question having arisen as to who were the parties entitled to this one-fourth, the surviving trustee of the settlement transferred the share, consisting of £2281 6*s*. £3 per cent. Reduced Annuities, into Court under the *Trustee Relief Act*.

This petition was then presented by *Frederick Hunt* asking that one moiety of the fund in Court might be transferred to himself and the other moiety to the executors of *Benjamin*, who had died, on the ground that the residuary gift in Mrs. *Hunt's* will operated as an appointment of the one-fourth badly appointed to *Frederick William Hunt*.

On behalf of the children of Mr. and Mrs. *Hunt*, other than *Frederick* and *Benjamin*, it was contended that the fund in Court became divisible, under the settlement, as in default of appointment, among all the children equally.

Marten, Q.C., and *Rawlinson*, for the Petitioner:—

Where by will there has been an excessive execution of a power, a residuary gift in favour of persons who are objects of the power is to be read as a good appointment: *In re Meredith's Trusts* (1); *In re Harries' Trust* (2); *Oke* v. *Heath* (3); *Falkner* v. *Butler* (4).

(1) 3 Ch. D. 757.
(2) Joh. 199.
(3) 1 Ves. Sen. 135.
(4) Amb. 514.

V.-C. B. 1885 *In re* HUNT'S TRUSTS.

Here the testatrix in terms gives the residue of all personal estate over which she has "any power of disposal": so that the residuary clause sweeps up whatever may have been previously ineffectually disposed of.

R. F. Norton, for the executors of *Benjamin Hunt*, took the same view.

Northmore Lawrence, for the Respondent, *Thomas Hunt*, one of the children claiming as in default of appointment:—

The question here is entirely one of intention, to be gathered from the words of this will, and therefore the authorities cited do not apply. Moreover, in those cases the appointments were of several sums, whereas here the testatrix purported to appoint the whole fund in the first instance, so that, having thus already exhausted her power, she cannot be said to have exercised it by the residuary gift. The gift only applies to the testatrix's own property—"my" personal estate "over which I have any power of disposal."

Lambert, for Mrs. *Little* and the trustees of the settlement made on her marriage, in addition to the arguments urged on behalf of *Thomas Hunt*, submitted that if the petitioner's contention was correct, the insertion of the gift over to the two sons, *Frederick* and *Benjamin*, in case of Mrs. *Little's* death without issue, was absolutely useless, inasmuch as the two sons would have taken under the residuary clause.

Marten, in reply.

BACON, V.C. (after stating the facts, continued):—

The question here is one of construction only.

Several authorities were referred to in the course of the argument, but, inasmuch as none of them deal with the question as purely and simply one of construction, I have been unable to find in any of them a guide by which I can satisfactorily arrive at a solution of the only question before me.

One well-established rule of the Court is that an intestacy will not be presumed unless it is indispensably necessary so to presume.

That the testatrix knew the power she possessed is abundantly clear. The purpose and object of a testator in disposing of a residue is that what may have been forgotten or imperfectly expressed shall nevertheless be included in the general terms he has employed; and this consideration I take to be the foundation of the rule I have referred to, viz. that the Court leans against intestacy.

The governing words of the will are, "all the residue;" and then follows an enumeration of the subjects to be included in that universal residue, and which subjects are unquestionably more than one. They consist of "my personal estate and effects whatsoever," &c., and besides that, "over which I have any power of disposal by this my will." She could not mean only her personal estate and effects, for, by the conjunction "and" preceding the words "over which I have any power," &c., she plainly distinguishes that which was her own from that over which she had merely a power of disposal; and it is only by a forced construction that the operation of the conjunction "and" can be held to be governed by or restricted to personal chattels and effects. Nor do I think that the universal controlling effect of the word "all," with which the sentence begins, is confined to or limited by the bequest of the personal estate of which she was the absolute mistress and owner; but that it applies also to the other subject of the residuary gift, of which subject she was not the owner, but over which she had full power of disposal within the words of her marriage settlement.

In the face of the word "all" it cannot be said that anything upon which her will could operate is omitted. The construction for which the petitioner contends (the appointment being to two of the testatrix's children, and within the very words of the power she possessed) is, in my opinion, the only one that can be properly put upon the words the testatrix has used.

There being no other question on the petition, the order will be as prayed.

Solicitors: *E. & F. Bannister; Wade & Lyall; G. P. King.*

G. I. F. C.

KAY, J.

1885

Dec. 10, 19.

HALLETT *v.* FURZE.

[1882 H. 3812.]

Mortgagor and Mortgagee—Action for Redemption and Foreclosure—Form of Judgment.

In an action by a second mortgagee to redeem the first mortgagee and to foreclose the mortgagor, the proper form of judgment is, that in default of the Plaintiff redeeming the action is to stand dismissed with costs.

THE Plaintiff, a second mortgagee, brought an action against the Defendants, the first mortgagees, to redeem, and the mortgagor to foreclose.

At the hearing the usual decree was made. The minutes of the judgment had been prepared by the Registrar, and delivered to the parties. They provided "that in default of the Plaintiff redeeming the action is to stand dismissed with costs" as against both the Defendants.

On the 10th of December, 1885, a motion was made on behalf of the Plaintiff asking that the minutes should be varied by limiting the dismissal to the Defendant, the first mortgagee, in case the Plaintiff should make such default.

Dunham, for the Plaintiff, submitted that the minutes should be varied as asked. They had been drawn up in accordance with precedents which, since the passing of the *Judicature Act*, 1873 (36 & 37 Vict. c. 66), were not now applicable. Costs were in the absolute discretion of the Court, and he appealed to that discretion, and asked that the Plaintiff should not have to pay the mortgagor's costs. The mortgagor had not paid anything, and when the Plaintiff resorted to his security, he found that it was quite absorbed by the prior mortgagee.

Bush, Q.C., for the mortgagor, submitted that the practice had in such cases always been to order the dismissal of the action with costs, and that it should be now followed.

KAY, J., ordered the case to stand over, so that the Registrar

might inquire what the practice had been, and report thereon (1), and that having been done, and the case being in the paper to be mentioned,

Dec. 17. KAY, J., said:—

I referred the case to the Registrar, and he has been good enough to give me a statement of the cases, which shew what the practice has been for a long series of years. It is clear that the usual form of order in such cases has been that the action should be dismissed with costs. The point was carefully considered by Vice-Chancellor Sir *James Wigram* in the case of *Pelly* v. *Wathen* (2) where, at page 364, he said (the suit being one by a *puisne* mortgagee to redeem prior mortgagees, and to foreclose the mortgagor): "Unless the registrar in drawing up the decree shall find the form to be other than I suppose, I think Mr. *Chandless* must be right in contending, that, if the Plaintiff's bill should stand dismissed in consequence of the Plaintiff not redeeming either of the prior mortgages . . . . he (the Plaintiff) would not be entitled to any decree, as against the mortgagor, for redemption or foreclosure." And at page 375 there is an express direction to dismiss in case of default against the mortgagor with costs. The effect of what is asked in this case would be, in case of default to redeem, to throw the costs of the action, so far as they relate to the mortgagor, upon him. I have now stated what the practice has for a long time been, and I will not depart from it. The motion must be refused with costs.

Solicitors: *Hallett & Woosnam; Winnett.*

(1) The report of the Registrar referred to the following authorities, which he said he had followed: *Jackson* v. *Brettall*, *Seton*, 4th Ed., p. 1084, Form 3; *Denny* v. *Blowers*, *Seton*, 3rd Ed. 477, the same form as above, and also in 2nd Ed., p. 217, and 1st Ed., p. 157, of the same book, and which was a decree for dismissal with costs to be taxed by the Taxing Master. He also referred to *Duberly* v. *Waring* and to *Thackwray* v. *Bell*, *Pemberton*, p. 269; to *Fisher* on Mortgages, 4th Ed., p. 1008, and to *Pelly* v. *Wathen*, 7 Hare, 364; and see *Cholmley* v. *Countess of Oxford*, 2 Atk. 267; and *Gibson* v. *Nicol*, 9 Beav. 403.

(2) 7 Hare, 351.

T. F. M.

CHITTY, J.
1886
Jan. 11.

In re BRIGHT-SMITH.
BRIGHT-SMITH *v.* BRIGHT-SMITH.

[1885 B. 5385.]

Will—Construction—"My freehold farm and lands"—Copyholds.

A testator devised a farm by the description of "my freehold farm and lands situate at *Edgware*, and now in the occupation of *James Bray*." The will contained no residuary devise. The farm comprised about seventy-six acres, of which twenty-six were copyhold.

Held, that the copyhold parts of the farm passed under the devise.

Hall v. *Fisher* (1) and *Stone* v. *Greening* (2) discussed and questioned.

MOTION.

G. A. Bright-Smith, by his will, dated the 19th of August, 1876, after making certain specific and pecuniary bequests, proceeded as follows: "I devise my freehold messuage, &c. . . . and my freehold farm and lands situate at *Edgware* . . . and now in the occupation of *James Bray*," to trustees upon trust to sell and to hold the proceeds upon trust to divide the same between and amongst his children in equal shares.

The will contained no general or other devise of real estate affecting the testator's farm and lands at *Edgware*.

The testator died on the 24th of September, 1882.

The farm and lands devised by the will contained in the whole about seventy-six acres, of which twenty-six acres were copyhold, and was at the date of the testator's will, and at his death, in the occupation of *Bray*, as one farm at one rent.

The Plaintiff, as the customary heir of the testator, took out a summons in Chambers for a declaration that upon the true construction of the will of the testator he was entitled as customary heir to the testator's copyhold lands, and the Judge in Chambers having declared that the copyhold lands passed under the devise in the will, he now moved to discharge the order.

Macnaghten, Q.C., and *Trevor White*, in support of the motion:—

There is an intestacy as to the copyhold parts of the farm. The

(1) 1 Coll. 47. (2) 13 Sim. 390.

word "freehold" in the devise is the leading part of the description, and the will must be read so as to make that the essential word, and in fact must be read as being "my freehold part of the farm and lands."

In *Stone* v. *Greening* (1) the question was, whether the words "my freehold messuage, farm, lands, and hereditaments, situate &c.," comprised the leasehold as well as the freehold part of the testator's farm at *Mursley*, and the Vice-Chancellor held that the leasehold part of the farm was not comprised in these words, but passed by the residuary bequest.

Again, in *Hall* v. *Fisher* (2), it was held that in a devise of "all that freehold farm called the *Wick Farm*, containing 200 acres or thereabouts," twelve acres which were leasehold did not pass.

They also referred to *Travers* v. *Blundell* (3) and *Hardwick* v. *Hardwick* (4).

Romer, Q.C., and *Hull*, for the younger children:—

The devise is of a farm and lands at *Edgware*, in the occupation of *Bray*, described as freehold. It cannot be doubted that under that description the testator intended to devise all the farm which *Bray* occupied. He describes it certainly as freehold, but if he meant to give the whole of the farm (which he certainly did), which is part freehold and part copyhold, will the word "freehold" be held to be so strong as to exclude the copyhold? The testator had no intention of dying intestate as to any portion of his property, and you must, if possible, so read the will as to lead to a testacy not an intestacy. In the case of *In re Harrison* (5), the Master of the Rolls says this: "There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce,—that he did not intend to die intestate when he has gone through the form of making a will."

Lord *Selborne* in *Hardwick* v. *Hardwick* does not speak with

(1) 13 Sim. 390.
(2) 1 Coll. 47.
(3) 6 Ch. D. 436.
(4) Law Rep. 16 Eq. 168.
(5) 30 Ch. D. 390, 393.

CHITTY, J. 1886 *In re* BRIGHT-SMITH. BRIGHT-SMITH *v.* BRIGHT-SMITH.

approval of *Hall* v. *Fisher* (1) and *Stone* v. *Greening* (2), and in both those cases there was a residuary devise, which there is not in this case.

In *Doe* v. *Lord Cranstoun* (3) a testator devised his freehold lands in the parishes of *A.*, *B.*, and *C.*, the lands, however, in the two latter parishes were leasehold only, and it was held that the leaseholds passed under the will.

T. C. Wright, for the trustees.

Macnaghten, in reply:—

The fact that in the cases of *Hall* v. *Fisher* and *Stone* v. *Greening* there was a residuary devise can make no difference.

CHITTY, J.:—

The question is whether the testator has died intestate as to one third of a small farm which he held, and which is referred to in his will. The total acreage of the farm is seventy-six acres, and upon a rough computation about one-third (somewhere about twenty-six acres) of the whole land is copyhold. Some parts of the copyholds are distinct, but other parts of the copyholds are so intermixed with the freeholds as to be practically indistinguishable. The testator makes his will in this way; he gives "my freehold farm and lands situate at *Edgware*, in the county of *Middlesex*, and now in the occupation of *James Bray*," and with that devise he couples other devises and bequests, that is to say, there is a devise first of a freehold messuage at *Charing Cross*, called the *British Coffee House*, which is described, and there is a leasehold property which is properly described, and these three properties are included in the devise to the same trustees, whose duty it is under the will to sell these properties and divide the proceeds equally among all the testator's children. Now, on the facts it appears, as I have said, that a part of the farm, which was situate at *Edgware*, and was in the occupation of the tenant *James Bray*, is copyhold, and the question is whether I am to read these words "my freehold farm," &c., in such a manner as to make the term "freehold" an essential

(1) 1 Coll. 47. (2) 13 Sim. 390.
(3) 7 M. & W. 1.

part of the description of the whole, or whether I can apply the description to the actual facts, and read it as a gift of the farm itself.

The principle of construction upon which I proceed is that which is stated in substance by Lord *Selborne* in *Hardwick* v. *Hardwick* (1). The first rule is this, "if all the terms of description fit some particular property, you cannot enlarge them by extrinsic evidence, so as to include anything which any part of those terms does not accurately fit." That is the first rule, but then the second rule is, "if the words of description when examined do not fit with accuracy, and if there must be some modification of some part of them in order to place a sensible construction on the will, then the whole thing must be looked at fairly in order to see what are the leading words of description, and what is the subordinate matter, and for this purpose evidence of extrinsic facts may be regarded."

The customary heir, the eldest son, says that the word "freehold" is an essential part of the description, and consequently he asks me to read—and this is his construction—this devise as if it was "I devise the freehold parts of my farm." I say advisedly that his construction does require some departure from strict accuracy. The choice lies between reading it in that way, or reading it as a gift of the farm. The words are "farm and lands." It appears to me that when a man gives his farm he means to give an entire subject, and that the last thing that he would think of doing in such a case as this, would be to give the freehold parts of this farm, and to die intestate as to the copyhold parts, leaving it to his children to litigate between them for the purpose of distinguishing the copyhold parts from the freehold. The farm is but a small one; it is all in the occupation of one tenant, and it seems to me that the word "farm" is, in a sense, an essential part of the description. I have referred to *Wharton's* Dictionary, and I find that, after giving in the usual way the Latin equivalent and the Saxon equivalent of the term "farm," a farm is said to be "land taken upon a lease under a yearly rent payable by the tenant. It is a collective word, consisting of many things, as a messuage, land, meadow, pasture,

(1) Law Rep. 16 Eq. 168, 175.

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wood, common, &c." I do not read that as a perfectly accurate description of what a farm is, but I think that the term means some entire subject-matter, and that I should be attributing to this testator an inaccuracy if I held he meant to give a part only of the farm, when, as I read the will, he intended to give the whole.

I think the case falls within the second rule that I have mentioned, and not within the first.

Authorities, of course, have been cited upon this, as it is a question of construction. I quite admit that on the question of the construction of wills relating to real property the cases have always had greater attention given to them than in the case of personalty, because land in *England* passes by title, and it has always been the habit of the lawyers and Judges to look with greater strictness to the reported cases where it is a question of land than where it is a question of personalty. But I must make up my own mind, as well as I can, upon the meaning of the testator in this will as shewn by the words he has used, and I refer to authorities only for the purpose of obtaining some light and some guidance.

Now I have mentioned *Hardwick* v. *Hardwick* (1) because that gives me a principle, and I prefer, as far as I can, to decide cases upon principle, that is to say, to apply the principle to the particular facts of each individual case. When you come to great niceties of expression, and look upon one will which is inaccurately framed, and another will which is equally inaccurately framed, there is very often a liability to err in trying to trace through the various forms of difficulties which each particular case gives rise to, and attempting to reconcile them, when very often they are not reconcilable, and attempting also to deduce some minute rules from the terms used.

Now, with these observations I propose to mention very shortly the other cases to which I have been referred; *Hall* v. *Fisher* (2) and *Stone* v. *Greening* (3), are the two authorities upon which reliance has been principally placed by the customary heir. Both these cases appear to me to have not received the assent

(1) Law Rep. 16 Eq. 168. (2) 1 Coll. 47.
(3) 13 Sim. 390.

and approbation of Lord *Selborne*, and, indeed, from his observations, I infer that he thought that it was at least questionable whether they were rightly decided. If I understand his judgment he rather refers to the high reputation of the Judges than to the particular excellence of the decisions when they were brought to his attention in *Hardwick* v. *Hardwick*. (1) But *Hall* v. *Fisher* (2) is clearly distinguishable. In the first place there was a residuary devise, and, as has often been pointed out, and as the Court of Appeal has lately pointed out in *In re Harrison* (3), it is a matter of some importance in construing a will to see whether the construction which is offered does or does not result in an intestacy. The present Master of the Rolls has expressed his opinion in regard to that point, speaking of it as a golden rule, that you ought, if possible, to read the will so as to lead to a testacy and not to an intestacy. Lord Justice *Fry* says that he assents to the conclusion which his learned Brother arrived at, on the ground that where there is a reasonable construction which results in a testacy, that construction must prevail rather than one which leads to an intestacy.

Now in the case of *Hall* v. *Fisher* I have said there was a residuary devise, but in the case before me there is nothing in the will which will catch these copyholds except the devise in question. That is one distinction, and the other is, that in *Hall* v. *Fisher* the settlement or limitation found in the will was a limitation which was not applicable to leasehold estates, it was one which was strictly applicable only to freehold.

Then in *Stone* v. *Greening* (4) it appears that the case was heard as a short cause, and I think even in the time of the Vice-Chancellor of *England* it was not the habit to argue short causes, and from the report of the case itself, it appears rather to have been stated by way of suggestion; possibly the parties were friendly one with another, and they took his opinion offhand. At any rate it does not appear to me to be a governing decision. Whether it is so or not, it is distinguishable also by the circumstance there, that there was a residuary devise.

The case of *Travers* v. *Blundell* (5) has some bearing, but not a

(1) Law Rep. 16 Eq. 168.
(2) 1 Coll. 47.
(3) 30 Ch. D. 390.
(4) 13 Sim. 390.
(5) 6 Ch. D. 436.

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very strong bearing, on the case before me. It affords a good illustration of the second branch of Lord *Selborne's* rule, and expounds well, if I may say so, the principle of *falsa demonstratio non nocet.*

I think the word "freehold" in this will is a word which may be rejected on the ground of false demonstration.

Solicitors: *Chester & Co.; Pemberton & Garth; H. Stanley Smith.*

G. M.

CHITTY, J.

1886

Jan. 15, 22.

In re THOMAS STEVENS.

Practice—6 Anne, c. 18 [In Revised Ed. Statutes, vol. ii., p. 188, referred to as c. 72]—Production of Cestui que vie—Tenant for Life—Wife of Tenant for Life in Possession—A Person having an Interest.

Under the statute 6 Anne, c. 18, the Court has power to make an order for the production of a *cestui que vie* as well upon a person having an interest determinable on a life, as on a person having an estate *pur autre vie* strictly so called.

MOTION.

By an order of the 10th of July, 1885, made on motion under the statute 6 Anne, c. 18, by a person entitled to an estate in remainder expectant on the death of one *Thomas Stevens,* the tenant for life, it was ordered that the wife of *Thomas Stevens* should produce *Thomas Stevens* at the parish church of *Tottenham* on the 18th of August, 1885.

It appeared that Mrs. *Stevens* was married to *Thomas Stevens,* who was a seafaring man, in 1858; that he went to sea in 1864, having some time previously put her in possession of the rents of the property in question, which consisted of a freehold house, telling her that she should receive the rent so long as he should live, and that she had ever since received such rents; that *Thomas Stevens* had not been heard of since except on two occasions, one being when he wrote to his wife some time in 1866, and the other when she thought she saw him at a funeral, but was too surprised to speak to him.

Mrs. *Stevens* was served with the above order, and not having

produced her husband as thereby directed, on the 6th of November, 1885, the applicant applied for and obtained an order on Mrs. *Stevens* for production of her husband at the bar of the Court on the 27th of November, 1885, and on the 11th of December, 1885, in default of such production, an order was made declaring that *Thomas Stevens* ought to be deemed and taken to be dead according to the statute, but the Registrar objected to draw up the order, on the ground that *Thomas Stevens* was tenant for life, and not *cestui que vie*, and that his wife was his agent and not his assignee, and therefore not tenant of an estate *pur autre vie* within the Act.

B. B. Rogers now moved that the order might be drawn up:—

For the purposes of applying the Act, all that is necessary is that there should be a person on whose death the right of the person in possession would determine: *Ex parte Castledine* (1).

Jan. 22. CHITTY, J.:—

I have carefully read the statute. The language is cumbrous and loose, but taking a succinct view of the statute, the result at which I arrive is that it is clear that there must be a person to produce and a person to be produced, and that the person required to produce must have some interest in the land determinable on the life of the person to be produced. It was decided in *Ex parte Castledine* that the assignee of a tenant for his own life was within the Act.

Reading the Act as a whole, and having regard to the preamble and to sects. 3 and 4, and also to sect. 1, in which the words "any other person" occur without qualification in reference to the person supposed to be concealing the death of another, I think that Mrs. *Stevens* is a person within the meaning of the Act against whom an order for production can be made, and a person having an interest in the land within the Act. It was clearly the intention of *Stevens* that his wife should take the rents for her own benefit and that of her children without accounting to him, and it appears that she has in fact taken the rents and never accounted for them, and that the property has been let by

(1) 44 L. T. (N.S.) 469.

CHITTY, J. 1886 *In re* THOMAS STEVENS.

her to a tenant who has recognised her as the only person entitled to receive the rents. Without going so far as to say that Mrs. *Stevens* is the equitable assign of her husband, or that he has given her any estate for her separate use, yet still I think he intended to confer on her some interest, and that she has such an interest as brings her within the Act.

Among the persons particularly described in the Act as bound to produce are guardians, which must be taken to mean guardians in socage or testamentary guardians, or guardians appointed by the Court, because guardians in chivalry had been abolished at the date of the Act. Such guardians in socage and the like have no legal estate in the land, but they are considered in the Act to have an interest determinable on a life, and I think I am justified in saying that Mrs. *Stevens* has an analogous interest. She is, moreover, within the mischief of the Act.

It appears that Mrs. *Stevens*, although she does not now appear, does not intend to resist the effect of this order, but the Registrar has rightly raised the objection.

I therefore direct the order to be drawn up. If *Stevens* should turn out to be alive (I think, however, that he is dead), he could treat this order as *res inter alios acta*, and as in no way standing in the way of his recovering his property. But in order to provide against any possible question, I will insert in the order a direction that any person interested shall be at liberty to discharge the order.

Solicitors: *Cree & Son.*

G. M.

IHLEE *v.* HENSHAW.

NORTH, J.

1886

Jan. 12.

[1884 I. 703.]

Trade-mark—Registration of Assignment—Right to sue.

Where a trade-mark has been registered, an assignee of the registered proprietor can bring an action to prevent the use of the trade-mark, without having registered the assignment.

ON the 15th of November, 1883, *H. F. Ihlee* and *W. C. Horne* registered a trade-mark for a musical instrument as the exclusive property of the firm of *Ihlee & Horne*. In 1884 the partnership was dissolved, and the share of *W. C. Horne* in the assets and goodwill were assigned by him to *H. F. Ihlee*. In February, 1884, *H. F. Ihlee* entered into partnership with *R. J. Sankey* upon terms under which the trade-mark was part of the assets of the partnership, and on the 3rd of July, 1884, they were registered as the proprietors of the trade-mark.

On the 11th of June, 1884, *Ihlee & Sankey* had brought this action against two Defendants named *Henshaw*, to restrain them from using a similar trade-mark.

Warmington, Q.C., and *Sebastian*, for the Plaintiffs.

Aston, Q.C., and *Pankhurst*, for the Defendants, objected that the action had been brought before the change of ownership had been registered; and according to the 77th and 78th clauses of the *Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 Vict. c. 57), no such proceeding could be instituted by *Ihlee & Sankey*. Any proceeding must be in the names of the registered proprietors.

Sebastian, for the Plaintiffs:—

The object of the Act was to have public notice of every trade-mark, and that is done by putting it on the register. The change was registered as soon as the forms of the office were got through.

NORTH, J. 1886 IHLEE v HENSHAW.

NORTH, J.:—

I think that the Act contemplated registration from time to time when an assignment took place; but I do not find anything in the words of the Act making such registration of the assignment a condition precedent to the right to sue. If I were to read the 77th section of the Act as Mr. *Aston* says I ought to read it, I should be obliged to read it as though it were expressed; "A person shall not be entitled to institute any proceeding to prevent the infringement of a trade-mark unless it has been registered in pursuance of this Act, and unless every assignment of it has also been registered." I cannot find such words expressed in or implied by the Act; and though, as I said before, I think the Act contemplates such registration—and it is very desirable that assignments should be registered—I cannot in the absence of a statutory provision to that effect say that an assignee is not entitled to sue unless not only the trade-mark but the assignment also is registered.

Solicitors for Plaintiffs: *Wansey & Bowen.*

Solicitors for Defendants: *Chester & Co.*, for *T. W. Millar, Manchester.*

C. M.

NORTH, J. 1885 *Nov.* 12.

In re CLOUGH. BRADFORD COMMERCIAL BANKING COMPANY *v.* CURE.

[1885 C. 700.]

Partnership—Surviving Partner—Mortgage for past Partnership Debt.

The surviving partner can give a valid charge on property of the partnership, by way of security for a debt incurred by the partners during the life of the deceased partner.

JOHN CURE and *Jonathan Clough* were partners in business at *Bradford*, and had deposited with the *Bradford Commercial Joint Stock Banking Company* title-deeds to certain property, with a memorandum of deposit, by which they agreed to execute a mortgage to the banking company for the balance which at any time

might be due to the banking company. *Clough* died in November, 1883, at which time the partners owed the banking company £6118. The banking company were not aware of the death of *Clough* until April, 1884, when £6125 was due to the banking company, and they applied to *Cure*, the surviving partner, for payment or further security. He thereupon deposited with them a contract for the sale of certain land to the partners (on which land they had erected buildings and had carried on their business) with a memorandum of deposit.

The banking company in February, 1885, brought this action against *Cure* and against *W. Clough*, administrator of *Jonathan Clough*, and against the heir of *Jonathan Clough*, claiming an account and payment, and a sale of the securities, and, if necessary, administration of the estate of *Jonathan Clough*.

Fischer, Q.C., and *J. G. Wood*, for the banking company:—

The administrator of *Jonathan Clough* alleges that *Cure*, as surviving partner, had no power to mortgage the assets of the firm, but he clearly had power. He was continuing the business, and the banking company were pressing, and could have sued, and by this means he obtained time to get in the assets and pay the debts: *Butchart* v. *Dresser* (1). No harm was done to anyone.

Eyre, for *Cure*, supported the banking company.

G. Williamson, for the administrator of *Jonathan Clough*:—

This was a preference of a creditor, and the Court cannot make an order affecting the creditors who are not represented here. *Cure* had no right to deal with the assets of the partnership in this way: *Lindley* on Partnership (2); and actually to dispose of the place of business.

NORTH, J.:—

I do not entertain any doubt about this case. The question is simply whether a surviving partner can after the death of his co-partner and the consequent dissolution of the firm deposit any

(1) 4 D. M. & G. 542. (2) 4th Ed. pp. 409, 413.

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of the assets of the partnership by way of security for a debt due from the partnership.

It is clear that the debt was created in the lifetime of the deceased partner, and, according to *Butchart* v. *Dresser* (1), if the surviving partner had made the deposit in exchange for a present advance for partnership purposes, beyond all question it would have been good. The only difference between the cases is that here no present advance was made in return for the deposit. Now, of course, if the deposit was not made in good faith, the transaction could not be maintained, nor if it appeared that the security was given for a private debt of the surviving partner; but here I am dealing with the case of a *bonâ fide* deposit, made in consequence of an application by a creditor to the surviving partner immediately after the creditor had heard of the death of the other partner. Next day the security was given, accompanied by a note: "We hand you contract dated 19th March, 1868, for purchase from Mr. *Horsfall*, which we lodge with you as a further security; and you are to have the same rights as if the contract had been lodged with you, together with the title-deeds you already hold, and had been included in the memorandum of deposit then signed." Now by this transaction no present consideration in the shape of an advance of money was obtained, but it is suggested that time was obtained, and that the creditor was induced to abstain from doing what he might otherwise have done, namely, realizing the securities which he had already got. It is quite true that no further definite time was given, but of course the whole object of the further security was that something should be given in return, and that meant time. The bank was not bound to any definite time, but the effect of the transaction was to obtain a reasonable time, and the obtaining a reasonable time was held by the Court of Exchequer Chamber in *Oldershaw* v. *King* (2) to be a sufficient consideration for a further guarantee.

But then the question is whether a surviving partner has power to make such a deposit. Now in the case of *In re Patent File Company* (3), the question arose as to the power of the directors of a company to deposit title-deeds belonging to the company as

(1) 4 D. M. & G. 542. (2) 2 H. & N. 517.
(3) Law Rep. 6 Ch. 83, 88.

a security for a past advance, and it was held that they had such power. The observations made by the Lord Justice *Mellish* apply very appropriately to this case:—"There being nothing in the articles to prohibit the giving such a security, I am of opinion that the company can give it as well for a past debt as a future one. In fact, the case is stronger in favour of a security for a past debt, as it would be absurd to say that a company has not power to pay past debts; and if so, why should it be debarred from giving security, which is one way of applying its property in payment of its debts." It is clear that the surviving partner could have paid off, out of the assets of the firm, any existing debt, and therefore he could equally well satisfy any creditor by giving security upon a part of the assets.

It seems to me, therefore, that the surviving partner was justified in what he did, and that the bank obtained a valid charge.

Solicitors for Plaintiffs: *Flower & Nussey*, for *Killick & Co., Bradford.*

Solicitors for *Cure*: *Jaques, Layton, & Jaques.*

Solicitors for *W. Clough*: *Williamson, Hill, & Co.*, for *Greaves & Taylor, Bradford.*

C. M.

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Nov. 4, 5, 9, 10, 12, 16, 17, 18; *Dec.* 21.

LYDNEY AND WIGPOOL IRON ORE COMPANY *v.* BIRD.

[1882 L. 1841.]

Company—Promoter—Secret Commission—Agent for Vendor—Costs—Higher Scale—Rules of Supreme Court, 1883, *Order* LXV., *rr.* 8, 9.

Agents employed by vendors to form and launch a company, for the purpose of purchasing some mines belonging to the vendors, undertook all the business connected with the issuing of the prospectus and the bringing out of the company. The agents respectively subscribed the memorandum and the articles of association of the company. They also guaranteed the subscription of the shares which were to be offered to the public. It was agreed between them and the vendors that they should receive a commission of £10,800 out of the purchase-money of £100,000 which was to be given by the company for the mines, and this payment was made after the formation of the company. The payment of the commission was not made known to the company. On its being afterwards discovered, an action was brought by the company to recover the £10,800 from the agents:—

Held, on the evidence, that the agents were acting solely as agents for the vendors; that the purchase-money was not increased for the purpose of providing for the commission; that the commission was really paid by the vendors; and consequently that the agents were not promoters of the company, and were not liable to account to them for the commission.

The agreement between the vendors and the agents also provided that the latter should have the conduct of the sales of the company's ores, and should receive a commission of 2 per cent. on the invoice amounts of sales effected. The arrangement was to continue until good cause should be shewn to the contrary. The arrangement was embodied in an agreement for the purchase of the mines which was entered into between the vendors and a trustee for the intended company. The purchase agreement was adopted by the company after its formation, and the articles of association provided that the agents should conduct the sales of the company in accordance with the purchase agreement:—

Held, that the interest which this arrangement gave the agents in the formation of the company was not sufficient to constitute them promoters.

Costs ought to be allowed on the higher scale in any case in which witnesses are properly examined in Court, and a long time is necessarily occupied in the argument.

THIS action was originally brought against *William Bird* and *James Bird*, who had been partners carrying on business under the firm of *William Bird & Co.*, and the Plaintiffs claimed a declaration that the firm of *William Bird & Co.* had received a sum of £10,800 as trustees for the Plaintiffs, and that the

Defendants were jointly and severally liable to account for and pay over that sum, with interest thereon at 5 per cent. per annum, to the Plaintiffs; and judgment for such account and payment.

Messrs. *Bird & Co.* carried on business as iron merchants in the city of *London*. In June, 1871, Messrs. *Thomas*, *William*, and *James Allaway* were the owners of some mineral property in the county of *Gloucester*, known as the *Wigpool Iron Mines* and the *Lydney Park Iron Mines*, and of some machinery and plant which they used for working the mines. The *Wigpool Mines* were held under a grant from the Crown, subject to dead rent and royalty, and the *Lydney Park Mines* were held under a lease at a dead rent and royalty. The whole property was subject to a mortgage for £40,000 to the *West of England Bank*. The Messrs. *Allaway* were also largely indebted to the bank in other sums of money. The bank had given notice to pay off the mortgage, and in June, 1871, the money not having been paid, the bank gave notice that they intended to sell the property. Messrs. *Allaway* desired to raise money to pay off the bank, and thus to prevent a sale of the property, and ultimately, through their solicitors, Messrs. *Poole & Hughes*, they applied to *Bird & Co.* to render them assistance. *Bird & Co.* suggested several schemes, and the scheme which was finally accepted was the formation of a company to purchase the property. This scheme was carried out, and the Plaintiff company was formed and registered on the 30th of December, 1871. It was ultimately arranged that the company should pay £100,000 for the property.

The agreement finally come to between Messrs. *Allaway* and *Bird & Co.* was contained in two letters, respectively dated the 19th of December, 1871.

The first letter was from *Bird & Co.* to Messrs. *Allaway*, and was as follows:—

"Dear Sirs,—In accordance with instructions from Messrs. *Poole & Hughes* and Messrs. *Fussell, Prichard, & Swann*, we are about to issue the prospectus as per corrected draft enclosed, and which thus has, we understand, your approval.

"A commission of £10,800 to be paid us as follows, viz., one-third on application, one-third on allotment, and one-third on 1st March, 1872. In consideration hereof we guarantee and provide

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for the subscription required from the public to complete the capital, we pay for the reports on properties and expenses in connection therewith already out of pocket, and also £200 of mortgagees' costs, and printing, advertising, and stockbrokers' fees, and brokerages. Our brokers will further apply in due course for a quotation and settlement on the *London Stock Exchange*, and endeavour to make a permanent market for the shares.

"In consideration of our personal services it is also agreed that we shall have the conduct and management of the business at our offices in *London*. Our remuneration to consist of 2 per cent. commission (which is to include brokerage where necessary) on the invoice amount of sales effected, and a fixed sum of £600 per annum for office rent, secretary's and clerks' salaries, auditors' fees, and the keeping of company's share register, transfer-books, minutes of board proceedings, &c.

"We proceed with issue of prospectus, on the assumption that all points that have been under consideration are now agreed."

Messrs. *Fussell, Prichard, & Swann* were the solicitors of the bank.

The other letter was from *James Bird* to Messrs. *Allaway*, and was as follows:—

"Dear Sirs,—There is some little misunderstanding, if I correctly understand Mr. *William Allaway's* letter of yesterday. The alteration in *William Bird & Co.'s* commission consists in this, that under the new arrangement they get less than they did under the other, for it all goes in 'guarantee.'

"I esteem myself fortunate, however, to have so arranged, for on the open market there was no certainty of floating £100,000 purchase-money. There is no past yielding *data* to satisfy a purchaser, and you cannot sell the future, or at least obtain full price for it, as if secured.

"It has not been so easy as you may imagine to draw up a prospectus. Opinions on value are very various, and the suggestions your favour of yesterday brings are again of a nature for which neither we nor the directors brought in could possibly accept the responsibility. The mortgage must be mentioned; in fact a suppression of material facts would be a grave responsibility for the board.

"Possession must be had by the 1st of January, 1872. There is not the slightest difficulty in arranging outstanding matters, or for the new company to assist in liquidating your affairs at *Wigpool* and *Lydney*.

"The £600 per annum finds the company in offices and clerks here. As the sum but little exceeds the auditor's claim for remuneration without office, there is little or nothing for *Wm. Bird & Co.*

"I have assented to commission being reduced to 2 per cent., because I really expect to save my brokerage through my own connection.

"Judging from the prices you might have got for *Wigpool* ore, I think you will find our commission amply recouped, and that ore may sell itself, but not at the best obtainable price. And in any case some one must take the responsibility, and exercise judgment respecting sales and buyers.

"Please understand that the commission on sales will be the principal remuneration of *Wm. Bird & Co.*; the general practice is to pay 2½ per cent., and we think you will find your *quid pro quo* in the management.

"I think, as you will have paid off £40,000, and be relieved from interest on it, will get £200 each (*T. A.* and *W. A.*) as directors, and have little or no care or responsibility in making the handsome dividend that can, I hope, be made on your £50,000 shares (by knowing the market and getting improved prices), you must admit I have not acted badly for your interest."

It had been at first proposed that the purchase-money for the property should be £90,000, but this sum was afterwards increased to £100,000. The commission to be paid to *Bird & Co.* was originally fixed at £5000, but it was afterwards raised to £10,800. The increase of the purchase-money was, as the Court held, agreed to because of the remonstrances of the Messrs. *Allaway*, who considered £90,000 an insufficient price for the property. The nature of their remonstrances is shewn by the following letter (*inter alia*):—

Nov. 28, 1871. *William Allaway* to *James Bird.*

"I wrote Mr. *Poole* yesterday in reply to his scheme, to say

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we consider he has not put enough down for the purchase-money of *Wigpool and Lydney Park Mines*—only £90,000. You must not say less than £100,000. *Wigpool* alone is worth the money. . . . We must put the purchase-money at £100,000, and must either put the capital at £160,000, or you must arrange it in some other way."

On the 19th of December, 1871, a contract of purchase was entered into between the Messrs. *Allaway* of the one part, and *Charles Greenwood* (as a trustee for the intended company) of the other part, whereby the vendors agreed (conditionally upon the company being formed) to sell their interest in the mines, machinery, and plant to *Greenwood* for £100,000, of which £50,000 was to be paid in cash, and £50,000 in fully paid-up shares of the company, on the completion of the purchase on the 30th of April, 1872. The vendors were to bear all expenses of the promotion and formation of the company up to the time of the allotment of the shares, excepting the usual law costs for the prospectus, and the preparation and registration of the memorandum and articles of association of the company. The purchaser was to take the property subject to the charge thereon of £40,000 to the *West of England Bank*, which the vendors undertook to indemnify him against, and to give their fully paid-up shares in the company as security for the fulfilment of the indemnity. The £40,000 was to be paid off by the vendors by annual instalments, the first payment to be made at the expiration of the third year from the date of the agreement. It was also provided that *Thomas Allaway* and *William Allaway* should be appointed directors of the company, and that Messrs. *Fussell, Prichard, & Swann*, and Messrs. *Poole & Hughes*, should be the solicitors of the company, and should so continue until good and sufficient cause should arise and be shewn for their removal respectively. It was also agreed that the conduct of the sales of the property of the company should be in the hands of Messrs. *William Bird & Co.*, who should receive a commission of 2 per cent., including brokerage, on all sales. They were also to be paid £600 per annum, in consideration of their paying the salary of a competent secretary, and providing all necessary clerks, together with offices for the business of the company, and

clearing all ordinary office expenses and disbursements, and this arrangement was to continue until good cause should arise and be shewn to the contrary. This agreement did not in any way refer to the commission of £10,800 which was to be paid to *Bird & Co.*, or to the guarantee which they were to give.

On the 30th of December, 1871, *William Bird* retired from the firm of *Bird & Co.*

On the same day the company was registered under the Companies Acts. The memorandum of association stated (*inter alia*) that the capital of the company was £150,000, divided into 15,000 shares of £10 each, and that one of the objects for which the company was established was the carrying into effect an agreement dated the 19th of December, 1871, made between the Messrs. *Allaway* of the one part, and *Charles Greenwood* of the other part, for the purchase of the vendors' interest in the *Wigpool and Lydney Park Mines*, and property connected therewith. *William Bird* and *James Bird* respectively subscribed the memorandum of association for fifty shares, and each of them also subscribed the articles of association.

The articles of association gave the directors power to carry into effect the agreement of purchase of the 19th of December, 1871, the effect of which was stated. It was provided that the costs and expenses of the preparation of the prospectus, memorandum, and articles of association of the company, and of and relating thereto, and of carrying out the same, but no other preliminary expenses, or any other fees or promotion money, should be paid by the company.

The articles also contained the following clauses:—105. "The firm of Messrs. *William Bird & Co.* shall conduct the sales of the company in accordance with the aforesaid purchase agreement, and some member of such firm shall from time to time attend and be present at the meetings of the directors." 106. "Messrs. *Poole & Hughes*, and Messrs. *Fussell, Prichard, & Swann*, shall be the joint solicitors of the company, in accordance with the said purchase agreement."

Neither the memorandum nor the articles of association, nor the prospectus of the company, contained any reference to the £10,800 which was to be paid to *Bird & Co.*

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At the first meeting of the board of directors of the company, on the 9th of January, 1872, the contract for purchase was adopted, and at the second meeting, on the 19th of January, 1872, the contract was sealed with the company's seal.

The arrangement as to the guarantee was, on the 9th of January, 1872, modified to this extent, that the guarantee was given by *William Bird* alone, and £5000 out of the £10,800 was paid to him as a consideration for his giving the guarantee. The remainder of the £10,800 was paid to the firm.

All the business connected with the issuing of the prospectus, and the bringing out of the company, was undertaken by *Bird & Co.*

After the commencement of the action *William Bird* died, and his executors were then made Defendants.

Higgins, Q.C., *Cookson*, Q.C., and *Bunting*, for the Plaintiffs:—

Bagnall v. *Carlton* (1) is exactly in point. *Bird & Co.* were not mere agents of the vendors; they were also promoters of the company, in the formation of which they had a considerable interest. They are, therefore, liable, as standing in a fiduciary position to the company, to refund the secret commission which they have received. Though it was paid to them nominally by the vendors, it was really paid out of the company's money. The purchase-money was increased for the purpose of paying the commission. *Emma Silver Mining Company* v. *Grant* (2) and *Lindsay Petroleum Company* v. *Hurd* (3) are to the same effect. The Defendants are entitled to retain sums properly expended by them on behalf of the company, but nothing more.

The fact that *Bird & Co.* were acting as agents for Messrs. *Allaway*, and rendering services to them, does not absolve them from accounting to the company for any commission which they received beyond their expenses. The evidence shews that they were the real promoters of the company. But, even a man who is an agent of the chief promoter of a company, is, if he performs the work of a promoter, liable as a promoter.

(1) 6 Ch. D. 371. (2) 11 Ch. D. 918.
(3) Law Rep. 5 P. C. 221.

Giffard, Q.C., and *Swinfen Eady*, for the Defendant *James Bird*:—

Bird & Co. were agents for Messrs. *Allaway*, and nothing more, and are not accountable to the company for money which they received from their own principals: *Arkwright* v. *Newbold* (1). Messrs. *Allaway* were the real promoters of the company; *Bird & Co.* were not promoters at all. And, if they are accountable for what they have received, they are entitled to deduct their expenses out of pocket, and also the value of the guarantee which they gave, and which they carried out by subscribing and paying for shares to the amount of £30,000: *Emma Silver Mining Company* v. *Grant* (2). There is no evidence that the purchase-money was increased to £100,000 for the purpose of increasing the commission of *Bird & Co.* It was increased because Messrs. *Allaway* insisted that £90,000 was too small a price for the property. The whole purchase-money belonged to the vendors, and they might have kept the whole of it as between themselves and the company. They could do what they pleased with it, and the company have no equity to compel *Bird & Co.* to account for what the vendors paid them, as their agents, out of the purchase-money. This case is not like *Bagnall* v. *Carlton* (3). It is like *Arkwright* v. *Newbold*. *New Sombrero Phosphate Company* v. *Erlanger* (4) was a case of rescission.

Cozens-Hardy, Q.C., *H. Burton Buckley*, and *Daldy*, for the executors of *William Bird*:—

The case against *William Bird* is very different from that against *James Bird*, and, even if *William Bird* himself was liable, his executors are not. A great part of the correspondence which is evidence against *James Bird* is not evidence against *William Bird*. If *James Bird* was a promoter of the company, *William Bird* was not. *William Bird*, by his guarantee, gave full value for what he received. He, in fact, received it by arrangement between himself and the new firm which was constituted on his retirement, and he undertook the liability on his guarantee for their benefit.

(1) 17 Ch. D. 301.
(2) 11 Ch. D. 918.
(3) 6 Ch. D. 371.
(4) 5 Ch. D. 73.

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Higgins, in reply:—

The £10,800 was really the money of the company. It is of course a question of fact whether *Bird & Co.* were promoters of the company. *Emma Silver Mining Company* v. *Lewis* (1), *Nanty-Glo and Blaina Ironworks Company* v. *Grave* (2), and *Twycross* v. *Grant* (3) are illustrations of what a promoter is. In the latter case *Cockburn*, C.J., said (4), "A promoter, I apprehend, is one who undertakes to form a company with reference to a given project, and to set it going, and who takes the necessary steps to accomplish that purpose." *Arkwright* v. *Newbold* (5) does not touch the question of promotion. The question there was whether the prospectus of a company was fraudulent. It was an action of deceit. That *Bird & Co.* were promoters is shewn by the fact that they did form the company. Moreover, they were personally interested in its formation. No allowance can be made for the guarantee; it cannot be valued.

Dec. 21. PEARSON, J.:—

The question I have to decide, as it has been put shortly by counsel, is this: Were the Messrs. *Bird* "promoters" of this company? If they were promoters, they are liable to pay back a part at all events, if not the whole, of the £10,800. If they were not promoters, they are not liable to pay back any portion of it.

So stated the question is a short one, but it is a question by no means free from difficulty.

In the autumn of 1871, and especially in the months of October, November, and December in that year, the Messrs. *Bird* were actively engaged in preparing and starting the company which now exists, and which was to purchase these mines. The Messrs. *Bird* allege that all which they did they did simply as agents for the vendors; that they were not promoters of the company in any proper sense of the word; and that the £10,800 which they received was received as payment for services rendered by them as agents to Messrs. *Allaway*. On the other hand, it is said that the Messrs. *Bird* were interested in the company themselves,

(1) 4 C. P. D. 396.
(2) 12 Ch. D. 738.
(3) 2 C. P. D. 469.
(4) Ibid. 541.
(5) 17 Ch. D. 301.

besides being the agents of the vendors; that the company was as much their company as the company of the Messrs. *Allaway*; and that, under those circumstances, according to the ordinary rule of this Court, they were trustees for the company at the time when they received the £10,800, and that they have no right to retain any more of it than they can shew to have been properly expended by them for the benefit of the company.

The simple question then is, which of those allegations is correct. Part of the case made against the Messrs. *Bird* was this, that, whereas originally they were to receive only £5000 for their services to the vendors, that sum was afterwards increased to £10,800, and that at or about the same time the price to be given by the proposed company for the property was raised from £90,000 to £100,000; in other words, that the £10,800 was paid out of money which came from the company, and not out of money which under any circumstances would have gone to the vendors. If that were so, of course the result would be that the Messrs. *Bird* have put into their pocket money which would otherwise have remained in the treasury of the company. If, on the contrary, the £100,000 was *bonâ fide* agreed to be paid to the vendors, without any regard to the sum which was to be paid to the Messrs. *Bird*, the vendors are the persons who have paid the £10,800, and the Messrs. *Bird* are entitled to retain it.

I have arrived at the conclusion that there is no foundation whatever for connecting the increase of the price from £90,000 to £100,000 with the increase of the sum to be paid to the Messrs. *Bird* from £5000 to £10,800. Looking at the whole of the transactions, and especially at the letters of the Messrs. *Allaway*, it is plain to me that the Messrs. *Allaway* were exceedingly anxious (as was natural) to get as large a sum as they possibly could for the mines, and that the £100,000 was fixed in consequence of their remonstrances, and not with a desire to put any part of it into the pockets of the Messrs. *Bird*.

[His Lordship referred to the correspondence, and particularly to the letter of the 28th of November, 1871, above stated, and continued:—]

I think it is plain that the idea of raising the purchase-money to £100,000 was the Messrs. *Allaways'*, and that it was not done

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in order to give the Messrs. *Bird* any larger profit than they would otherwise have had. Although there is some difficulty in tracing the transactions, my conclusion is that the £10,800 was substituted for the £5000 when the Messrs. *Bird* undertook to guarantee the placing of the shares in the company. I think, therefore, the sound conclusion is, that the £10,800 was to be paid by the vendors out of the purchase-money which they were to receive from the company, and that the company were not to pay any portion of it. If that be so, the case undoubtedly comes within *Arkwright* v. *Newbold* (1), in which the Court of Appeal, finding that the purchase-money of property sold to a company had not been increased or loaded in order to pay promotion money, at once said that the money was paid by the vendors, and that the vendors had a right to deal with the purchase-money in any way they pleased.

It was strongly urged that the Messrs. *Bird* did many things in the course of the transaction which shewed that they were promoters; that they took upon themselves the drafting, the settling, the printing and publishing of the prospectus of the company, and that they throughout acted as if they were the masters of the situation from the beginning, and thus shewed themselves to be the persons principally interested in the matter, the Messrs. *Allaway* playing only a secondary part. I am at a loss to find in any one of these things evidence that the Messrs. *Bird* were acting in any other way than as agents of the vendors. To my mind it was their duty under the circumstances to do everything with regard to the prospectus which they actually did. They were to pay all the expenses of it (there was nothing improper in that), and it was their duty, they being in *London* and having charge of the whole business, to take care that the memorandum and articles of association were properly drawn, and to see that everything was done in conformity with law and in the interest of their clients. I do not think that anything which they did shews that they overstepped their duty as agents, or did more than was properly required from them as agents.

There remains, however, another point, and it is that which has given me the greatest trouble. The Messrs. *Bird* were to

(1) 17 Ch. D. 301.

guarantee the placing of the shares, and while the thing was in progress they bargained with the Messrs. *Allaway* that, when the company was established, they should have the selling of the ores, and should receive a commission for so doing, and it occurred to me that possibly this was enough to shew that they had such an interest in the formation of the company, over and above their duty as agents to the vendors, as would constitute them promoters of the company.

The question is whether that made them really promoters of the company. No doubt a very little will make people promoters of a company, if it can be seen that they were really doing something in the way of speculation for their own interest, and not acting merely as agents for others. But the Messrs. *Bird* were undoubtedly agents for the vendors, and they were entitled to be paid as such. And all that they bargained for was this, that, if the company was started by means of their services as agents for the vendors, they should be named in the articles of association, not as permanent agents for the company, but simply that they should have the first chance of becoming the agents of the company at a remuneration which does not seem to me to have been very much above the market price. I think it would be too hard to hold on this ground that they must be considered as having become promoters of the company. Clause 105 of the articles of association says that Messrs. *William Bird & Co.* "shall conduct the sales of the company in accordance with the aforesaid purchase agreement." The purchase agreement is to the same effect, except that these words are added: "And this arrangement is to continue until good cause arise and be shewn to the contrary." That does not, as it seems to me, add much to the provision in the articles of association, and it certainly leaves to the company the power of putting an end to the agreement with Messrs. *Bird*, if good cause should arise for so doing. It is to be observed that the same purchase agreement provides that Messrs. *Poole & Hughes* are to be the solicitors of the company, and, if I were to hold that the making Messrs. *Bird* the agents of the company for the sale of their ores on commission constituted them promoters of the company, I should

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have great difficulty in saying that Messrs. *Poole & Hughes* were not also promoters. I think the circumstances are not sufficient to take this case out of the ordinary rule, that a vendor to a company is at liberty to pay his agent whatever he pleases, provided that the money really comes out of his own pocket, and not out of the coffers of the company.

Having come to the conclusion that the £100,000 was fairly fixed as the price of the property, without any reference to the remuneration of the Messrs. *Bird*, I think that the vendors, and not the company, have paid the £10,800, and that the action is not maintainable against the Messrs. *Bird*. This relieves me from going into the question whether Mr. *William Bird* or his estate would have been liable in any event. All I can do is to dismiss the action with costs. I give costs on the higher scale. I think costs should be allowed on the higher scale whenever witnesses are properly brought into Court, and a good deal of time is necessarily occupied in the argument.

Solicitors for Plaintiffs: *Learoyd & Co.*
Solicitors for Defendant *James Bird*: *Munton & Morris.*
Solicitors for executors of *William Bird*: *Freeman & Bothamley.*

W. L. C.

PEARSON,J. 1885 *Nov.* 10, 11, 12; *Dec.* 21.

In re JAMES'S TRADE-MARK. JAMES *v.* PARRY.

[1885 J. 1112.]

Trade-marks Registration Act, 1875 (38 & 39 *Vict. c.* 91), *s.* 10—*Distinctive Device—Pictorial Representation.*

A pictorial representation of an article is not a proper trade-mark for such article.

THE Plaintiffs, Messrs. *Edward James & Sons*, manufacturers of black lead, claimed an injunction to restrain the Defendants, *M. J. Parry & Co.*, from infringing the Plaintiffs' trade-marks No. 431 and No. 12,279. There was no evidence of the infringe-

ment of the mark No. 431. A motion was made on the part of the Defendants "that the entry in the register of trade-marks of a representation of a cylinder with rounded top as a trade-mark in reference to black lead No. 12,279 of the 8th of June, 1877, may be expunged."

The motion was heard immediately before the trial.

In the year 1861 the Plaintiffs registered under the *Useful Designs Act* then in force (6 & 7 Vict. c. 65), a design for the shape or configuration of blocks of black lead. The design consisted of a cylinder with a hemisphere or dome at the top. It was notified on the register that "The purpose of utility to which the shape or configuration of the new part of this design has reference is that by reason of the dome shape it is less liable in use to break and waste than the cylindrical form." Under that Act the registered owner of a design was protected in the use of it for three years. The Plaintiffs in June, 1877, registered the trade-mark in question; it consisted of the impression in black from a wood-cut representing the shape of their black lead blocks: "black lead" was given as the description of goods to which it was applicable. The Plaintiffs sold their black lead in boxes, on the outside of which was a trade label having in the middle a representation of a block of dome black lead similar to the registered device, except that it bore the words "trade-mark" on it.

The Defendants made blocks of black lead, which they called "cylinder" black lead, in three shapes, one shape was a cylinder with flat ends; another was a cylinder rounded at the top; and the third a shorter cylinder rounded at the top. The Defendants sent out their black lead in boxes with labels on the outside similar in character to the Plaintiffs' trade labels, bearing on them the representation in black of the three shapes in which they made their black lead blocks; the Defendants had registered the word "cylinder" as a trade-mark for black lead. This word was on their label, and their labels as first issued contained the words "registered trade-mark" partly on each side of the representation of their shapes of black lead.

After the writ was issued the Defendants altered the position of the words "registered trade-mark" on their label.

PEARSON, J. 1885 *In re* JAMES'S TRADE-MARK. JAMES v. PARRY.

Everitt, Q.C., and *Bousfield*, for the Defendants, in support of the motion:—

It is settled law that the name of an article is not by itself a proper trade-mark for that article: *In re Leonard & Ellis's Trade-mark* (1); *In re Palmer's Trade-mark* (2); *Cheavin* v. *Walker* (3); *In re Anderson's Trade-mark* (4), which was affirmed on appeal. The mischief of allowing such trade-mark to be registered and used as a monopoly would equally occur if the Plaintiffs were to maintain as their private trade-mark the picture which they have registered of the article they sell. There has been no actual case decided in this country on a pictorial representation, but in *America* the question has been discussed in Courts of Justice, and it seems that there such a trade-mark will not be allowed: *Sebastian* on Trade-marks (5).

Cozens-Hardy, Q.C., and *Carpmael*, for the Plaintiffs:—

A word which is used primarily as a trade-mark may be a good trade-mark though it also becomes descriptive of the article to which it is applied: *Ford* v. *Foster* (6); *Hirst* v. *Denham* (7); *Ransome* v. *Graham* (8): *Braham* v. *Bustard* (9). "Dome" black lead means black lead made by the Plaintiffs. There is no reason why or authority for saying that a design of the article sold should not be a proper trade-mark. In registering such a trade-mark there would be nothing to prevent a rival manufacturer from properly describing on his covers the articles sold.

[PEARSON, J.:—Ought a vendor to be prevented by the existence of such a trade-mark from imprinting on his outside covers a picture of the article sold?]

He would not; but he must not imitate the trade-mark on the register, nor, as the Defendants have done, represent that the design is his own trade-mark.

Everitt, in reply.

(1) 26 Ch. D. 288.
(2) 24 Ch. D. 504.
(3) 5 Ch. D. 850.
(4) 26 Ch. D. 409.
(5) 2nd Ed. p. 39.
(6) Law Rep. 7 Ch. 611.
(7) Ibid. 14 Eq. 542.
(8) 51 L. J. (Ch.) 897.
(9) 1 H. & M. 442.

[The action was then tried.]

Dec. 21. PEARSON, J.:—

In this case, *James & Son*, makers of "Dome" black lead, have brought an action against *Parry & Co.* seeking to restrain them from improperly using a trade-mark which consists of the representation of a dome-shaped block of black lead. *Parry & Co.* met this by stating that *James & Co.* had no right to register the trade-mark, it being one that ought not to be registered; and it is admitted that if the Defendants are right, the action must fail. The simple question, therefore, which the Court has to try in the first instance is whether that representation is a trade-mark which could be registered under the Act of 1875?

The section which applies is the 10th section. It enacts that:—"For the purposes of this Act: a trade-mark consists of one or more of the following essential particulars; that is to say," then follow three kinds of trade-marks recognised, first, a name; secondly, a signature; thirdly (the head under which, if any, this comes), "a distinctive device, mark, heading, label, or ticket; and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures; also any special and distinctive word or words or combination of figures," [the word "figures" there meaning "numerals"], "or letters used as a trade-mark before the passing of this Act may be registered as such under this Act." I think it is plain that this last proviso does not make this representation of a dome a good trade-mark; we are therefore thrown back on the positive enactment in the former part of the section, and if the mark comes under any of the words it must be as a "distinctive device."

Is this, then, a distinctive device which can properly be registered under the Act? After a great deal of hesitation I have come to the conclusion that it cannot. It seems to me nothing more than a representation of the article sold, and it comes under the mischief of the use of words describing the article, as Mr. *Everitt* has properly argued; and it has been pointed out over and over again, that the name of the article to be sold cannot be registered as a trade-mark. I put this difficulty to Mr. *Cozens-*

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Hardy. Was it possible for the person claiming a trade-mark to say that a vendor of an article shall not put on the boxes or papers containing it, a drawing representing the article? Mr. *Cozens-Hardy* was forced to admit that he did not think that he could, but, with his usual caution, he added that he must not put it so as to be taken for a trade-mark. I am at a loss to see how it could be put so as not to appear to be a trade-mark if nothing more was said. Is the vendor to surround the drawing with a halo, and inscribe within the halo, "This is not a trade-mark"? I think not. Curiously enough, though it has not arisen here, the question has been several times before the American Courts, whether a man can have as a trade-mark a drawing of the article sold, and they have decided that he cannot, because it is the common property of all the world. Of course those decisions are not binding on the English Courts. But I must hold that this is a thing that cannot be registered as a trade-mark under the Act, and consequently I must order it to be removed from the register, and the action will fail.

Solicitors: *Crowder, Anstie, & Vizard*; *Wilson, Bristows, & Carpmael.*

D. P.

PEARSON, J. 1886 *Jan.* 13, 14, 18.

In re YEILDING AND WESTBROOK.

[1885 Y. 194.]

Vendor and Purchaser—Sale of Real Estate—Failure of Vendor to shew Title—Vendor and Purchaser Act, 1874—*Summons—Jurisdiction—Costs of investigating Title.*

On making an order, upon a summons by a purchaser under the *Vendor and Purchaser Act*, 1874, declaring that the vendor has not shewn a good title to the property, the Court has jurisdiction to order the vendor to pay the purchaser's costs of investigating the title and to charge them upon the vendor's interest in the property.

In re Higgins and Hitchman's Contract (1) followed.

SUMMONS under the *Vendor and Purchaser Act*, 1874, by a purchaser of real estate, asking for a declaration that a good title

(1) 21 Ch. D. 95.

to the property had not been shewn by the vendor in accordance with the particulars and conditions of sale, and that the vendor might be ordered to pay the costs of the application.

J. T. Prior, for the summons.

J. Henderson, for the vendor.

PEARSON, J., held that a good title had not been shewn.

Prior asked for the costs of the summons, including the purchaser's costs of investigating the title. The latter costs can be given upon a summons under the *Vendor and Purchaser Act; In re Higgins and Hitchman's Contract* (1), though there Vice-Chancellor *Hall* expressed some doubt as to the jurisdiction.

J. Henderson, for the vendor.

Jan. 18. PEARSON, J.:—

The deposit must be repaid with interest, and the purchaser must have the costs of the summons, including his costs of investigating the title. The costs will be charged on the vendor's interest in the property. In making this order I follow the decision of Vice-Chancellor *Hall* in *In re Higgins and Hitchman's Contract* (2). If that was an innovation, I think it was a good one.

Solicitor for purchaser: *Herbert B. Bell.*
Solicitors for vendor: *Yeilding & Barlow.*

(1) 21 Ch. D. 95, 99. (2) 21 Ch. D. 99.

W. L. C.

PEARSON, J. BATTEN *v.* WEDGWOOD COAL AND IRON COMPANY.

1886

Jan. 13, 16, 18.

[1875 B. 257.]

Solicitor—Negligence—Summary Jurisdiction—Omission to procure Investment of Purchase-money paid into Court—Damages—Costs—Liability of Solicitor to a Person who was not his Client.

An order was obtained by the solicitor for the Plaintiff that the purchaser of property, sold under an order of the Court in an action, should pay his purchase-money into Court, and that the money when paid in should be invested in Consols. The Plaintiff had the conduct of the sale. The money was paid into Court by the purchaser, but the Plaintiff's solicitor omitted to leave with the Paymaster the necessary request for its investment, and consequently the investment was not made. On the further consideration of the action it was ordered that the balance of the purchase-money, after the payment of certain costs, should be paid to the receiver in the action, in part satisfaction of a balance due to him. The carriage of the order was given to the receiver, and he then discovered that the purchase-money had not been invested. He took out a summons, asking that the Plaintiff's solicitor might be ordered to pay to him the amount of interest lost by the non-investment of the purchase-money:—

Held, that the solicitor, as the officer of the Court having the conduct of the sale, was responsible not only to his client but to the Court for the due discharge of his duty, and that he must make good to the person entitled the loss of interest, but that he was entitled to a set-off in respect of a gain which had resulted from a fall in the price of Consols between the time when the investment ought to have been made and the date of the order on further consideration:

Held, that this liability could be enforced by summons in the action.

On allowing the set-off, it appeared that the amount to be paid by the solicitor would be only £5 8*s.* 6*d.*:—

Held, that the solicitor must pay the costs of the summons.

THIS suit was instituted in July, 1875, by a holder of debentures issued by the Defendant company (on behalf of himself and the other debenture holders) against the company for the purpose of realising the security given for the debentures. The trustees of a deed, whereby the company conveyed their property to the trustees, on trust to secure the payment of the debentures, were also Defendants. In August, 1875, a receiver and manager of the property comprised in the deed was appointed. In December, 1875, a decree was made for accounts and inquiries,

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and it was ordered that the property comprised in the deed should be sold. The conduct of the sale was given to the Plaintiff. In 1882 Mrs. *Batten* was substituted as Plaintiff for the original Plaintiff, and the conduct of the sale was given to her. For some time no purchaser could be obtained for the property, but ultimately Mr. *R. Attenborough* offered £1600 for it. His offer was accepted, and in August, 1883, the sale to him was confirmed by the Court. On the 22nd of December, 1883, an order was made that the purchaser should, on or before the 19th of January, 1884, pay his purchase-money into Court to the credit of the suit, and that, upon such payment being made, he should be let into possession of the property. And, at the request of the Defendants, it was ordered that the £1600 should be invested in Consols, and the dividends thereon accumulated and invested in the same way. Mr. *Musgrave*, Mrs. *Batten's* solicitor, attended on the making of this order. The purchase-money was paid into Court on the 21st of January, 1884. After the payment had been made Mr. *Musgrave* omitted to leave with the Paymaster a request for the investment of the money, and consequently it was not invested. On the 25th of November, 1884, the suit was heard on further consideration. The only fund which had been realised was the £1600, and by the order on further consideration it was directed (1) that the fund should, after providing for some prior claims, be applied in paying—(1) the Plaintiff's costs of the realization of the property; (2) the balance due to the receiver; (3) the costs, charges, and expenses of the trustees of the debenture deed; (4) the costs of the Plaintiffs; (5) the debenture holders.

The carriage of this order was given to the receiver, and he then discovered that the investment of the £1600 had not been made. It turned out that, after satisfying the prior claims, the balance of the £1600 was insufficient to pay what was due to the receiver.

On the 24th of June, 1885, the receiver took out a summons, asking for a declaration that Mr. *Musgrave* was liable to pay the loss which had accrued to him in consequence of *Musgrave's* neglect, as solicitor of the Plaintiff having the conduct of the cause, to bespeak the investment of the £1600; that the amount

(1) *Vide* 28 Ch. D. 317.

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of the loss might be ascertained; and that *Musgrave* might be ordered to pay the amount when ascertained to the receiver.

Cookson, Q.C., and *E. Ford*, for the receiver:—

It was the duty of *Musgrave*, as the solicitor of the person who had the conduct of the sale, to procure the investment of the £1600 in pursuance of the order. In order that it should be invested it was necessary, under the provisions of rule 37 (1) of the Chancery Funds Consolidated Rules, 1874, which were then in force, that a request to make the investment should be left, with the order, at the Paymaster's office, and it was, therefore, the duty of *Musgrave*, as the Plaintiff's solicitor, to leave that request. He is liable in damages for his omission to do this, and he is liable to the receiver, who is the person solely interested in the residue of the £1600, after satisfying the prior claims, for the loss of interest occasioned by the non-investment. *Musgrave*, as the solicitor of the person having the conduct of the sale, was the only person entitled to appear on the application for the order of the 22nd of December, 1883: *Daniell's* Chancery Practice (2). He was really acting as agent for all the parties to the action, and was the custodian of the fund.

The liability to make good this loss can be enforced in a summary way: *Pulling* on Attorneys (3); *In re Aitkin* (4).

Cozens-Hardy, Q.C., and *Heath*, for *Musgrave*:—

Musgrave was not solicitor to the receiver, and is not responsible to him. He is responsible only to his own client (the Plaintiff), and she has suffered no damage. At any rate, interest cannot be allowed after the date of the order on further consideration, the carriage of which was given to the receiver, and *Musgrave* is entitled to a set-off in respect of a fall in the price of Consols

(1) Rule 37. "When an order . . . directs . . . the investment . . . of money in Court, . . . the Chancery Paymaster may defer giving effect to such direction until a request in writing to give effect thereto has been left at the Chancery Pay Office, but it shall be the duty of the solicitor for the person having the carriage of such order . . . to leave it and such request at the Chancery Pay Office without unnecessary delay."

(2) 6th Ed. p. 1091.

(3) 3rd Ed. p. 429.

(4) 4 B. & Al. 47.

between the 21st of January and the 25th of November, 1884. If Consols had been purchased in January, 1884, and sold in November, 1884, the cash produced would have been less than £1600.

PEARSON, J.:—

I am sorry that I have to decide this question between these parties, for one of them must suffer. There is no imputation upon Mr. *Musgrave* for what has happened, beyond this, that, after the order for the payment of the purchase-money into Court had been made, he, or his clerk, forgot to leave the order at the Paymaster's office with a request to make the investment. [His Lordship stated the facts, and continued:—] I do not agree with the contention that Mr. *Musgrave* is not liable except to his own client. The conduct of the sale rested with him because he was the solicitor of the Plaintiff, and as such he was discharging the duty which devolved upon him, and no other solicitor would have been entitled to charge for that which he was doing. But he was acting as an officer of the Court, and in that character, I conceive, he was liable to the Court for the due discharge of his duty. Until I am corrected by a higher tribunal I shall hold that the Court has a summary jurisdiction to make a solicitor liable for not properly discharging his duty under such circumstances. I think, therefore, that he is liable to make good to the receiver the loss of interest which has resulted from the non-investment of the money. But, inasmuch as the price of Consols fell in the interval between January and November, 1884, Mr. *Musgrave* is entitled to set off the gain which has resulted from that fall against the loss of interest occasioned by the non-investment. The receiver is only entitled to be recouped what he has actually lost. The money ought to have been invested within a week after it was paid into Court. Mr. *Musgrave* must, therefore, make good the interest for the period from the 28th of January to the 25th of November, 1884, but he will be allowed the deduction which I have mentioned.

Jan. 16. *Cookson*, Q.C., for the receiver:—

A calculation has been made, from which it appears that, taking

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into account the fall in the price of Consols, the amount which Mr. *Musgrave* will have to pay to the receiver by way of damages will be £5 8*s.* 6*d.* This is a substantial sum, and Mr. *Musgrave* ought to pay the costs of the summons, including the costs of the adjournment into Court.

Cozens-Hardy, Q.C., for *Musgrave*:—

The amount recovered is so small that no costs should be given.

Jan. 18. PEARSON, J.:—

I must give the receiver the costs of the application.

Solicitor for receiver: *C. Harcourt.*
Solicitor for *Musgrave*: *J. Vernon Musgrave.*

W. L. C.

In re PHELPS' SETTLEMENT TRUSTS.

C. A. 1885 Dec. 4.

Appointment of New Trustees—Vesting Order—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *ss.* 2, 5, 32, 34 [*Revised Ed. Statutes, vol. x., pp.* 982, 983, 990]—"*Person of unsound mind*"—*Trustee incapable from Age and Infirmity.*

The clause in sect. 2 of the *Trustee Act*, 1850, which declares that the expression "person of unsound mind" shall mean "any person, not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs," must be construed as referring to a person who, although not found a lunatic, is nevertheless in such a state of mind as to render him liable to be so found if an inquisition were held upon him.

The case of a trustee who is from great age and its infirmities practically incapable of transacting business (though not otherwise of unsound mind) is within the 32nd section of the *Trustee Act*, 1850.

PETITION.

By a settlement made on the marriage of the Petitioner, *Sackville Phelps*, and dated the 14th of February, 1844, property was assigned to the Rev. *T. P. Phelps*, the Rev. *J. J. Goodall*, and *Acton Tindal*, upon certain trusts for the benefit of *Sackville Phelps*, his wife, and their issue, and otherwise; and power was given to *Sackville Phelps* to appoint new trustees. There was no issue of the marriage, and the wife died in April, 1867.

Acton Tindal died in October, 1880; and *Sackville Phelps* and *T. P. Phelps* (one of the two surviving trustees of the settlement) now presented a petition for the appointment of two new trustees of the settlement in the place of *Acton Tindal* and *J. J. Goodall* (the other surviving trustee of the settlement), and asked that the trust property might be vested in the two new trustees upon the trusts of the settlement, jointly with the Rev. *T. P. Phelps* for all the estate and interest of *T. P. Phelps* and *J. J. Goodall* therein. The petition contained an allegation that *J. J. Goodall* was eighty-five years of age, and that he was now and during the past twelve months had been from advanced age and failing memory incapable of transacting any business; and also an allegation that *Sackville Phelps* did not desire to exercise the power of appointing new trustees vested in him, and that under the

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circumstances, it was inexpedient to appoint new trustees without the intervention of the Court.

This petition was supported by an affidavit of *E. R. Baynes*, stating in one paragraph that *J. J. Goodall* was "eighty-five years of age, and is now, and during the last twelve months has been, from advanced age and failing memory, mentally incapable of transacting any trusteeship business." The petition was served on Mr. *J. J. Goodall*, but he did not appear. Upon the petition coming on for hearing before Mr. Justice *Kay*, his Lordship thought that according to the evidence Mr. *Goodall* was a person of unsound mind within the meaning of sects. 2 and 5 of the *Trustee Act*, 1850, and also (as was suggested by Mr. *Kekewich*, Q.C., as *amicus Curiæ*) that the petition ought to have been entitled in lunacy. His Lordship, however, allowed the petition to stand over in order that further evidence might be produced as to the mental and bodily condition of Mr. *Goodall*.

Two further affidavits were accordingly produced, one by Mr. *Baynes*, in which, referring to the above paragraph of his former affidavit, he stated "I did not intend by such paragraph to point to any unsoundness of mind of *J. J. Goodall*, but simply to state that he was worn out by extreme old age and consequent want of memory, and so had become incapable of transacting any business." The other affidavit, which was made by the medical attendant of Mr. *Goodall*, stated that "his great age has so impaired his memory, and extreme deafness has rendered it so difficult to communicate with him, that it is practically impossible for him to transact any business, and I am of opinion that any reference to business would probably greatly agitate him, and might in such case seriously affect his health."

Upon this evidence Mr. Justice *Kay* still considered that Mr. *Goodall* was a person of unsound mind within the meaning of the sections above referred to, and dismissed the petition.

The Petitioners now appealed.

Tremlett, in support of the appeal:—

This is a case for the exercise by the Court of its jurisdiction in Chancery alone, and not one for the exercise of its jurisdiction in Lunacy, for all that the evidence shews is a personal incapacity

through age and infirmity, not amounting to lunacy, which renders Mr. *Goodall* incapable of transacting business, and brings the case within the operation of sects. 32 and 34 of the *Trustee Act*, 1850.

[He cited *In re Lemann's Trusts* (1) and *In re Bignold's Settlement Trusts* (2).]

LINDLEY, L.J.:—

I am of opinion that the order may be made. There is great difficulty in drawing a hard and fast line between persons of mental incapacity within the 2nd section of the Act, and persons suffering from old age and its infirmities, who are provided for by sect. 32. My opinion is that sect. 2 relates to persons who would be found insane upon inquisition. I think the facts stated in the affidavits bring the present case within sect. 32.

FRY, L.J.:—

I am of the same opinion. I think the case is brought within sect. 32.

Solicitors: *Pyke & Parrott.*

(1) 22 Ch. D. 633. (2) Law Rep. 7 Ch. 223.

W. W. K.

C. A.
1885
CHITTY, J.
Dec. 11.

LONDON AND BLACKWALL RAILWAY COMPANY *v.* CROSS.

[1885. L. 3012.]

Considered. DANISH MERCANTILE CO. LD. *v.* BEAUMONT. [1951] 1 Ch. 680

C. A.
1886
Jan. 11, 12.

Arbitration—Unauthorized use of Name—Injunction to restrain—Jurisdiction—Lands Clauses Consolidation Act, 1845.

The lessee of a ferry served a notice on a railway company on behalf of himself and his lessors claiming compensation for injury to the ferry, and requiring the dispute to be submitted to arbitration under the *Lands Clauses Act*. The lessors had not given authority to use their names; the Act of the railway company provided for compensating the lessors of the ferry but did not mention their lessee; and the notice claimed one lump sum without distinguishing the interests of the lessors and the lessee. The railway company brought an action for an injunction to restrain the lessee from proceeding to arbitration under the notice:—

Held, by *Chitty*, J., that a proceeding in the name of a person who had given no authority ought to be stayed, and that an injunction ought to be granted, the unauthorized use of the name of the lessors distinguishing the case from *North London Railway Company* v. *Great Northern Railway Company* (1):—

Held, on appeal, that though the Court in which an action is brought has jurisdiction to stay proceedings in it if it has been brought without authority, the Court has no general jurisdiction to restrain persons from acting without authority, and that an injunction could not be granted to restrain a person from taking proceedings out of Court in the name of a person who had given no authority to use it.

THE *Poplar and Greenwich Ferry Company* was incorporated by 52 Geo. 3, c. cxlviii. for the purpose of establishing a ferry between *Greenwich* and the *Isle of Dogs* and making roads and approaches to it, and was authorized by the Act to claim certain tolls for animals passing along any part of the roads, and certain other tolls for animals, carriages, goods, wares, and merchandize carried across the river. By 54 Geo. 3, c. clxxi. the company was empowered to demand a toll of 1*d.* for each person carried across. In 1868 the company demised to the *Potters Ferry Society* for a term of forty-eight years from Christmas, 1866, the toll of 1*d.* authorized by the last-mentioned Act, and the rights of ferryage conferred by the earlier Act, but not the right to

(1) 11 Q. B. D. 30.

tolls for using the roads. *Cross* became the assignee of the interest conferred by this lease, which contained a power of attorney authorizing the lessees and their assigns to use the name of the lessors for the purpose of enforcing payment of the toll assigned.

By the *London and Blackwall Railway* (*Steamboats*) *Act*, 1873, the railway company were empowered to run steam vessels for the conveyance of passengers between their railway and the existing landing-place at *Greenwich*, and by sect. 6 it was enacted that: "The *Poplar and Greenwich Ferry Company* shall be entitled to compensation from the company for any loss, damage, and injury which may be occasioned to them by reason of the exercise of the powers of this Act in respect of the conveyance of animals, carriages, goods, wares, and merchandize, and the persons travelling with the same, to which the *Poplar and Greenwich Ferry Company* may have the exclusive right, across the River *Thames* between the *Isle of Dogs* and *Greenwich*, and in respect of the right of that company to take the toll authorized by sect. 2 of an Act of 54 Geo. 3, c. clxxi., intituled, &c., and such compensation in case of dispute shall be settled in manner provided by the *Lands Clauses Consolidation Act*, 1845, for the settlement of disputed cases of compensation." By sect. 14 it was provided that nothing in the Act should prejudice, alter, or affect any rights, powers, tolls, or privileges to which the ferry company were then entitled under the above Acts of 52 Geo. 3, and 54 Geo. 3.

By the *Metropolitan Board of Works* (*Bridges*) *Act*, 1883, (46 & 47 Vict. c. clxxvii.), the Board were empowered and directed to purchase the undertaking of the ferry company. Sect. 52 provided for the transfer of the undertaking to the Board, and that the transfer should be subject to the lease of 1868, and that the lease should remain in force for the residue of the term, and should after the transfer be read as if the Board of Works were the lessors instead of the ferry company. The 52nd section provided that the ferry company, after the completion of the transfer and the winding-up of their affairs should be dissolved. The terms of the purchase were settled and the purchase-money paid in 1885, but the ferry company was not yet actually dissolved.

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On the 5th of November, 1885, *Cross* served on the railway company a notice which, after reciting in full the 6th section of the *London and Blackwall Railway* (*Steamboats*) *Act*, 1873, proceeded: "And whereas we the said *Poplar and Greenwich Ferry Company*, and I, *George James Cross*, as owner and lessee respectively of the rights and tolls above-mentioned, have suffered such loss, damage, and injury as hereinbefore mentioned, Now we do respectively give you notice that the amount of our claim in respect of such loss, damage, and injury is the sum of £50,000, and that, unless you the said *London and Blackwall Railway Company* come to an agreement with us to pay us such amount, we further give you notice that we desire to have the amount of compensation payable to us under the above recited 6th section of the *London and Blackwall Railway* (*Steamboats*) *Act*, 1873, settled by arbitration in manner prescribed by the *Lands Clauses Consolidation Act*, 1845." This notice was signed by *Cross* on his own behalf and also by him as attorney for the ferry company.

The railway company commenced this action against *Cross*, asking for an injunction to restrain them from proceeding to arbitration under the notice. It appeared that he had used the name of the ferry company in the belief that the power of attorney contained in the lease enabled him to do so. He had applied to that company for leave to use their name, which had been refused on the ground that, as the lease contained that power, any further consent on their part was unnecessary.

The motion was heard before Mr. Justice *Chitty* on the 11th of December, 1885.

Romer, Q.C., and *Nasmith*, in support of the motion:—

Unless the defendant can shew, which he cannot, that he has a power of attorney from the ferry company to claim compensation in their name in the proceedings before the arbitrator under sect. 6 of the Act of 1873, we are entitled to restrain him from the unauthorized use of their name. The lease of the tolls from the ferry company of February, 1868, of which the Defendant is assignee, does not give him any such authority. It merely provides that on giving a bond the lessees are to be at liberty to defend any proceedings that may be taken against the company

(the lessors) in respect of their not having kept up the ferry, and it gives them the right to use the name of the company in enforcing payment of the tolls and getting in the tolls, but that does not give the lessees (or their assignee) the right to use the name of the company for the purposes of sect. 6 of the Act of 1873.

Pollard, for the Defendant:—

I submit that the lease of 1868, which has been confirmed by the Act of 1883, under which, subject to our lease, the Metropolitan Board of Works took over the undertaking of the ferry company, gives the Defendant the right to use the name of the lessors in the arbitration proceedings; and this is confirmed by the answer of the company, when we applied for express authority, that none was necessary having regard to the lease.

[CHITTY, J.:—That does not matter; you have no power from them unless it is in the lease. They may be wrong in their law.]

The lease is a demise of the whole of the objects of the company for the remainder of their existence, and whatever rights the company have, including the claim to compensation, pass to the lessees. But assuming that the Defendant has no title under the lease, and that any right to compensation still remains in the ferry company, then the arbitration will be merely futile, and there will be a good defence to any action brought on the award against the Plaintiffs, so that they are not damnified in any way. If they think the Defendant has no claim they need not attend the arbitration.

[CHITTY, J. referred to *Aslatt* v. *Corporation of Southampton* (1).]

It has been expressly decided that the Court has no jurisdiction to restrain a party from proceeding with an arbitration in a matter beyond the agreement to refer, even though such arbitration proceedings may be futile and vexatious, and if allowed to proceed will cause delay: *North London Railway Company* v. *Great Northern Railway Company* (2); the only case in which the Court

(1) 16 Ch. D. 143. (2) 11 Q. B. D. 30.

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has interfered to restrain an arbitrator from acting is where he is unfit or incompetent to act: *Beddow* v. *Beddow* (1).

[CHITTY, J.:—The Plaintiffs do not ask to restrain you from proceeding to arbitration, but to restrain you from using the company's name.]

It is not the ferry company which is here seeking to prevent my use of their name, but the opposite party. It is not like an action, in which the railway company might apply to set aside the proceedings if it should be decided that I had no right to use the name of the ferry company. The arbitrator does not decide the title but simply assesses the compensation which is payable, and that compensation when paid to the ferry company will come to the Defendant by virtue of the lease. Is not the Defendant, therefore, as the sole person interested in that compensation, entitled to use the name of the ferry company in an arbitration, as distinguished from an action, in order to get that assessed which will come to him if the arbitrator awards anything in respect of it? And, further, after the decision in *North London Railway Company* v. *Great Northern Railway Company* (2) this Court has no jurisdiction to restrain me from proceeding with the arbitration.

Romer, in reply:—

We rely on the general principle that where an action or any legal proceeding is taken in the name of another person without his authority, the Court has jurisdiction to stop it. All that the Court of Appeal decided in the case of *North London Railway Company* v. *Great Northern Railway Company*, relied upon by the Defendant, was, that if a person claims compensation who is not entitled to compensation, that in itself gives no right to apply for an injunction. But that is not this case, where the claim purports to be made by a person who is entitled to compensation. If a claim is put forward by a person who has no right whatever, I can afford to treat it with contempt, but when a claim purports to be made by a person (here the ferry company) who has a right, how can I afford to treat that person with contempt by not going

(1) 9 Ch. D. 89. (2) 11 Q. B. D. 30.

into the arbitration. If it had been an action, clearly I could have stopped it, and if it had been a petition it is also clear I could have stopped it. I have no other remedy. If I stand by and allow an award to go as against me in the name of the ferry company, how can I afterwards say that the ferry company are not entitled to it?

CHITTY, J.:—

This is a motion on behalf of the *London and Blackwall Railway Company* to restrain the Defendant from using the name of the ferry company in proceedings before an arbitrator. The proceedings intended to be brought are under sect. 6 of the *London and Blackwall Railway (Steamboats) Act*, 1873. Under that section the *Poplar and Greenwich Ferry Company* are entitled to compensation from the railway company for certain loss and damage which may be occasioned to them by reason of the exercise of the powers of that Act. The ferry company had, to put it shortly, a statutory or some other ferry, and it was perfectly consistent that the profits of the ferry would be interfered with by the undertaking authorized by the Act of 1873, and consequently the Legislature gave compensation as upon the footing, to put it generally, of disturbance to the ferry. Instead of bringing an action for disturbance, the Act of Parliament having rendered the disturbance lawful, compensation according to the usual course in such matters was given to the person disturbed. The compensation is only given to the ferry company.

Now the Defendant had a lease from the ferry company, for a term of forty-eight years, of certain rights to which they were entitled, either as statutory owners or otherwise of the ferry, in the year 1868. It was argued that the lease itself contained an express authority from the company to the Defendant, empowering him to use the company's name for the purpose, amongst others, of this question of compensation; but when the lease is looked at, there clearly is no express power of attorney of the kind that is asserted. The lease practically demises, so far only as the company lawfully can, the toll of 1*d.* for every person crossing the River *Thames* by the ferry, and it contains an express power in the name of the lessors, their executors and

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assigns, to demand, sue for, and recover the sum or toll of 1*d.* Now a proceeding under sect. 6 of the Act of 1873, is not a proceeding to recover the toll of 1*d.*, consequently that clause does not contain the authority that was alleged.

Then there is a proviso, the substance of which may be thus stated, that in proceedings instituted against the ferry company, compelling them to re-establish or maintain the statutory ferry, or for other purposes, then a certain notice may be given, and a power of re-entry in certain events, and an express power is conferred on the lessees in the name of the lessors to prosecute to final determination all proper and lawful defences to the proceedings there mentioned. That confers no power, therefore, to bring any action generally, or to make any demand under sect. 6. Then it is suggested, rather than argued, for the Defendant, that the ferry company had parted with the whole of their undertaking to the Defendant, and consequently that Mr. *Cross* was the equitable assignee, but when the instrument is looked at, it is plain that it is but a lease. There are covenants on the part of the lessee, there is a small rent reserved, and it is quite plain that that proposition cannot be maintained.

It would be almost as extravagant to say that in an ordinary case a lessee, where any injury is done to the property, can use the name of his lessor for the purpose of protecting the particular tenement. That fell to the ground. The result, therefore, is that no authority is shewn. Some suggestion was made with reference to the affidavits on this point, but it appears by the affidavits on the part of the Plaintiffs, that they received a letter from the ferry company to the effect that no authority whatever has been conferred upon the Defendant to use their name in the notice he has given, which is a notice that he shall bring the parties before the arbitrator.

That being the state of the case, it appears to me the Defendant is using the name of the ferry company without authority. Thereupon a point of law is urged and it is said that the Court, notwithstanding the *Judicature Act*, has no power to grant an injunction, and the decision of the Court of Appeal in *North London Railway Company* v. *Great Northern Railway Company* (1)

(1) 11 Q. B. D. 30.

has been relied upon, for the purpose of shewing that the principle upon which the Court grants injunctions has not been extended by the *Judicature Act*. In that particular case it was held that there was no jurisdiction to grant an injunction to restrain a party from proceeding with an arbitration in a matter which was outside the agreement, though the arbitration proceeding would be futile and vexatious. That is the rule which the Court of Appeal has adopted with reference to what is "just and convenient" within the meaning of the words in sect. 25, and although their decision is unquestionably at variance with what was done by the late Master of the Rolls, I am bound by it, and it is no part of my duty even to comment upon the decision. It might have appeared that it was very useful to stop a course which led to very great expense at the commencement, but the Court of Appeal says, and I am bound by it, that at any rate in a case in which a proceeding in an arbitration would be futile and vexatious, it is better to let the futile and vexatious proceedings go on than to restrain them at the beginning, for in that case the idleness of the proceedings will be afterwards discovered when an action is brought on the award. As I have said that binds me. The question is, whether the principle of that case applies to the one before me.

Now it is undoubted that if an action is commenced in the name of a certain person as plaintiff, not only may that person himself intervene, but the law of the present day is that the defendant may bring the matter before the Court, shewing that the name has been used without authority. That has been repeatedly done of late, and there is no question about it. That might be done by the Court, if an action be brought or a petition be presented, or there was a summons, or indeed if any other proceeding were taken in the Court itself. Then the question is, whether I should be right in acting on that same principle with reference to a proceeding which is not in this Court, but is a proceeding before an arbitrator. I think there is great force in what has been urged for the Plaintiffs.

If the Defendant goes on using the name of the ferry company without authority he will possibly obtain an award. I will assume that he will, and that he will obtain an award for compensation payable to the ferry company, and upon that award he may bring

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his action. It may be still open to the Court to consider the point which I am now considering, namely, that the name was used without authority, and to say, therefore, that although the name was used, the action could not be maintained, because in fact there was no authority, but I think there would be great difficulty about it. The present Plaintiffs, it would be said, would have gone into arbitration, for most prudent men would go into an arbitration even when they are advised that the proceedings in the arbitration are altogether wrong; they do not like to run the risk of treating them as futile and letting a much larger sum go against them even on the futile proceedings than would be awarded if they were to go in. It certainly would seem a strong case against the Plaintiffs if they had gone into the arbitration and defended themselves against the claim, and treated this as the claim of the ferry company. I do not pretend to be extending the principle on which injunctions are granted, but I think it is right in such a case as this to intervene at the beginning, there being shewn to be no authority, and to grant an injunction restraining the Defendant from using the name of the ferry company.

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The Defendant appealed, and the appeal was heard on the 11th and 12th of January, 1886.

Pollard, for the Appellant:—

The Court cannot grant this injunction. The case is covered by *North London Railway Company* v. *Great Northern Railway Company* (1). There is no legal injury even if the proceeding is ill founded and frivolous. Summary judgment cannot be obtained in a proceeding under the *Lands Clauses Act*, for nothing is within the jurisdiction of the arbitrator but the *quantum* of compensation. The claimant cannot get judgment except by bringing an action on the award, and at the trial of that action it will be determined whether the sum awarded belongs to the claimant. Mr. Justice *Chitty* considered that the procedure as to stopping an action commenced in a person's name without his authority applied here, but the cases on that subject relate to solicitors, who are

(1) 11 Q. B. D. 30.

officers of the Court, using a person's name without authority, and the application was made in the action itself, not in an action for the purpose of obtaining an injunction. They turn on the power of the Court over its own record.

Romer, Q.C., and *Nasmith*, *contrà*:—

The *London and Blackwall Railway* (*Steamboats*) *Act* provides that compensation shall be paid to the ferry company. Proceedings are taken in the name of the ferry company for compensation, and the railway company are informed that the ferry company has given no authority to use its name. It is a legal wrong that proceedings should be taken against me in the name of a person who has given no authority to use his name. How am I to get my costs if the proceedings fail?

[LOPES, L.J.:—Could an injunction have been obtained in a case like this before the *Judicature Acts?*]

We submit that it could, but there is no authority on the point, as the question arose only with respect to actions, and the course of applying in the action itself furnished a more convenient remedy than applying for an injunction in an action brought for the purpose. Suppose an action is brought against me in a Court which has no jurisdiction in the matter, is there to be no way of stopping the proceedings? Under the old practice I could have demurred to the jurisdiction.

[LOPES, L.J.:—Can you, after the decision in the Queen's Bench Division which has been referred to, maintain the injunction in the present case?]

Yes; on the ground that the claim is frivolous, and that its being prosecuted will subject me to costs. *B.* claims saying he has authority from *A.* If he has not, if obliged to go on, I shall incur costs for nothing. The ferry company, which did not take any proceedings, might ratify these proceedings in the course of them if they are allowed to go on, and I ought not to be kept in this state of suspense.

[LINDLEY, L.J.:—I doubt whether they could. A notice to quit given without authority cannot be effectually ratified.

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FRY, L.J.:—I share that doubt. An unauthorized act, the effect of which if authorized would be to create a liability in a third party, cannot be made effectual for that purpose by subsequent ratification. How do you distinguish this from the case in the Queen's Bench Division?]

On the ground that what was done in that case would not result in any legal injury; the case was simply one of a person making a wrongful claim. Here if *Cross* had no authority, he is committing a wrong in asserting that he has, and an action would lie against him for asserting that he has it if the assertion causes damage. This proceeding is maintenance.

[LINDLEY, L.J.:—*Cross* appears to have used the name of the ferry company in the *bonâ fide* belief that the power of attorney in the lease authorized him to do so.]

If it had been clear maintenance the railway company might have disregarded the proceeding, but if there is any reason for supposing that there may be authority they could not safely do so, as the award would probably be for an excessive sum if the proceeding went on *ex parte*. The Court, then, ought now to settle the point. The Court, on an application in an action stops the action if the party's name has been used without authority. It does so in the action itself, because the Court has jurisdiction in that action, but the ground is, that the institution of such an action is a wrong.

[FRY, L.J.:—The Court in such a case gives costs, charges, and expenses.]

That we submit is in our favour, it shews that the Court is giving damages for a wrong.

[FRY, L.J.:—If *Cross* has authority your ground fails; if he has not authority you need not attend the proceeding.]

That argument might be used in every case where a defendant asks for costs, it may be said: "As the plaintiff is in the wrong you need not have attended." If this had been a proceeding before any Court, an order could have been obtained for staying it, and it would be a scandal in our jurisprudence if it cannot be stayed because it is under the provisions in the *Lands*

Clauses Act. The claim is of the most untenable description; in addition to the want of authority to use the name of the ferry company, the notice is bad, because it combines in one the claims of the lessor and lessee, who are entitled to compensation separately, if at all; and moreover, the Act provides for compensating the ferry company, but not for compensating their lessees. In the case in the Queen's Bench Division the parties had submitted disputes to arbitration, here they have not.

Pollard was not called upon to reply, but referred to the observations of the Lord Justice *Knight Bruce*, in *Pennell* v. *Roy* (1): "It is not a duty or function, or within the power, of this Court, to restrain men from prosecuting frivolous, litigious, and desperate suits, merely because they are so," and of Lord Justice *Turner* (2): "If we were to maintain this injunction we should, as it seems to me, be assuming a jurisdiction in this Court to prescribe the Courts in which parties should bring their suits, without there being anything to affect the consciences of the parties, upon the simple ground that the suits were such as, in the opinion of this Court, ought not to be maintained, and thus we should be bringing under the decision of this Court the question whether suits in other Courts could be maintained—a question which it is for those Courts, and not for this Court, to decide."

LINDLEY, L.J.:—

This is an appeal from an order made by Mr. Justice *Chitty*, restraining the Defendant, Mr. *Cross*, from proceeding with a claim for compensation made by him in his own name and in the name of the *Poplar and Greenwich Ferry Company* under circumstances which I will shortly explain. The *Poplar and Greenwich Ferry Company*, which is a company incorporated under an Act of 52 Geo. 3, leased in 1868 a portion of its rights for forty-eight years, and Mr. *Cross* is the assignee of that lease. It appears that for some years the ferry created by the Act of Geo. 3 which I have mentioned had fallen more or less into disuse, so that Mr. *Cross* did not derive much benefit from the lease which had been assigned to him, but at the same time he retained his rights

(1) 3 D. M. & G. 126, 133. (2) 3 D. M. & G. 139.

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under it. In 1883 the Metropolitan Board of Works were empowered to buy up the rights of the ferry company subject to this lease. The Board of Works has done so, and the ferry company has practically ceased to exist, though theoretically it still continues, as it has not yet technically been dissolved.

Under those circumstances Mr. *Cross* has, and, as the Plaintiffs contend, without any authority from the *Poplar and Greenwich Ferry Company*, served the *London and Blackwall Railway Company* with a notice dated the 5th of November, 1885, purporting to be signed by him as attorney for the ferry company as well as in his own right, in which, after reciting the 6th section of the *London and Blackwall Railway* (*Steamboats*) *Act*, 1873, upon which he founds his rights, he says: "And whereas we, the said *Poplar and Greenwich Ferry Company* and *T. G. J. Cross*, as owner and lessee respectively of the rights and tolls above-mentioned, have suffered such loss, damage, and injury as hereinfore mentioned, now we do respectively give you notice that the amount of our claim in respect of such loss, damage, and injury is the sum of £50,000," and that unless the railway company come to an agreement with them to pay that amount, they desire to have the amount of compensation settled by arbitration according to the *Lands Clauses Act*. The *Blackwall Railway Company* object to that notice, and say they are entitled to restrain Mr. *Cross* by injunction from proceeding upon it. Their objections to the notice are very formidable. They say, first of all, you, Mr. *Cross* have no right in point of law to use the name of the *Poplar and Greenwich Ferry Company*. They say, secondly, if you had such authority, your notice is bad in form, inasmuch as you have lumped up in one sum that which is payable to the ferry company as reversioner and that which is payable to yourself as tenant; and thirdly, the 6th section of the Act on which you rely provides only for payment of compensation to the ferry company and not to you.

The first question which we have to consider is this, how those questions are to be determined and when. Now it is familiar to most of us who have studied the *Lands Clauses Consolidation Act* and the course of proceedings under it, that there was at one time before 1851 some ground for contending that where a person made an unfounded claim under the *Lands Clauses Act* his right

to substantiate that claim could be tried by an injunction, and Lord *Cottenham* on more than one occasion granted an injunction to restrain proceedings under the *Lands Clauses Act* by persons who had no right to compensation. One such instance will be found in the well-known case of *London and North Western Railway Company* v. *Smith* (1). That practice was discussed and considered with great care by Lord *Truro* in *East and West India Dock Company* v. *Gattke* (2), decided in 1851. Ever since the decision of Lord *Truro* in that case the practice has been perfectly well settled, that the proper way of trying the right of a person to compensation under the *Lands Clauses Act* is not by injunction, and an injunction to restrain such proceedings has never that I know of been granted since 1851. Leaving out of consideration the fact that Mr. *Cross* is professing to act as attorney for the company, let us take the case where a person having no right to compensation nevertheless claims compensation under the *Lands Clauses Act* and proceeds under the arbitration clauses in that Act, and where the railway company against whom he is proceeding contend that whatever award he may get from the arbitrator he is not entitled to any compensation at all, and that they ought therefore to be protected from the vexation of having to go into arbitration proceedings. That is of course a strong case, but, as I say, ever since *East and West India Dock Company* v. *Gattke* it has been settled that in such a case it is not right for the Court of Chancery to investigate the question of title or no title at that stage of the proceedings, and that the proper way of trying the question is to leave the claimant to bring an action on the award, when, if he has no title he will get nothing, and if he has a title he will get the sum awarded.

Now let us observe the position in which railway companies are put by this state of things. Supposing a claimant having no real ground of claim proceeds to arbitration and gets an award in his favour, and brings an action upon it, and fails, he will have to pay the costs of the action, but I am not aware that there is any method by which the railway company can make him pay them any costs which they have incurred in the arbitration. I do not say that there is none, but I am not aware that there is

(1) 1 Mac. & G. 216. (2) 3 Mac. & G. 155.

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any. Now, notwithstanding the argument that if the claimant is wrong he cannot recover on the award, and therefore the company need not attend before the arbitrator, it is quite obvious that all prudent men, (and railway companies must act as prudent people), would watch the proceedings before the arbitrator, and must therefore incur costs. Notwithstanding that, and notwithstanding the apparent enlargement by the *Judicature Act*, 1873, sect. 25, of the power of the Court to grant an injunction, the Court of Appeal has decided, in *North London Railway Company* v. *Great Northern Railway Company* (1), that the practice settled by Lord *Truro* in *East and West India Dock Company* v. *Gattke* (2), as long ago as 1851, has not been altered by the *Judicature Acts*, and that there is still no right or jurisdiction in the Chancery Division of the High Court to restrain a person from proceeding for compensation under the *Lands Clauses Consolidation Act*, on the ground that he is not entitled to compensation. The decision in that case must not be understood as going further than that. The grounds upon which it proceeds are perfectly explained by the Master of the Rolls and by Lord Justice *Cotton*. The case does not decide that in no case is it right to restrain persons from proceeding to arbitration; there are cases in which it is quite right to do so. One of such cases came before Vice-Chancellor *Wood*, *Maunsell* v. *Midland Great Western (Ireland) Railway Company* (3). It was an action by a shareholder on behalf of himself and the other shareholders in the company, against the company and its directors and another company, to restrain them from proceeding to arbitration under an agreement in respect of breaches of clauses which were *ultrà vires*. That case, and cases of that kind, are wholly unaffected by the decision to which I am alluding. The case must not be supposed to go this length, that there is no authority whatever in the Court of Chancery to restrain proceedings before an arbitrator, but I think it goes this length, that in all cases under the *Lands Clauses Act* the practice is that the question of right or no right to compensation is to be tried by an action on the award, and not by an action for an injunction in the earlier stage of the proceedings. One can easily see that there

(1) 11 Q. B. D. 30. (2) 3 Mac. & G. 155.
(3) 1 H. & M. 130.

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are conveniences on the one side and on the other, but in my opinion the balance of convenience is in favour of declining to interfere by injunction.

Having arrived at the real grounds of the decision in *North London Railway Company* v. *Great Northern Railway Company* (1), we have to consider whether there is any substantial difference between that case and this. That there is a difference has been pointed out by Mr. *Romer*, viz., that Mr. *Cross* here is assuming to take proceedings in the name of the ferry company, and, it is alleged, without authority. Now, supposing he has no authority, what will be the position of the *Blackwall Railway Company?* Mr. *Cross* must go on under the *Lands Clauses Act* at his own risk as to costs, and will, I assume, obtain an award. If Mr. *Romer* is right, and so far as I can see he is right, Mr. *Cross* will fail when he brings an action on that award, and the company will obtain the costs of that action. They may—I do not say will—fail in getting from Mr. *Cross* the costs which they will have incurred as prudent people in watching his proceedings before the arbitrator. Supposing they do so fail, they will be in no worse position than in any other case where a claimant under the *Lands Clauses Act* obtains an award and fails in an action to enforce it. Indeed I am not sure that they will not be in a better position, because it may be that Mr. *Romer* is right in contending that an action will lie against Mr. *Cross* upon his warranty of authority. I do not say that such an action will lie but, if it will, so much the better for them. But assuming that they can recover from him those costs in an action of that kind, it does not follow that this Court ought to interfere now at this stage of the proceedings by injunction. I should say that the right to bring such an action tends rather the other way. The very first principle of injunction law is that *primâ facie* you do not obtain injunctions to restrain actionable wrongs, for which damages are the proper remedy. If we look at the principle of the thing, it appears to me that the distinction between this case and the case of *North London Railway Company* v. *Great Northern Railway Company* is a distinction without a real difference of principle, and that it would, upon a balance of convenience in proceedings under the *Lands Clauses Act*, be more

(1) 11 Q. B. D. 30.

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inconvenient to entertain the question of authority now, than to leave it to be disposed of in the ordinary way by an action on the award.

It is right that I should make a few observations upon the reason given by Mr. Justice *Chitty* for distinguishing this case from that of *North London Railway Company* v. *Great Northern Railway Company* (1). He put it on this ground, that Mr. *Cross* was proceeding without authority, and that therefore there was jurisdiction to restrain him from using the names of his alleged principals, and he referred to the doctrine that if an action is brought by a person without authority it can be stopped. That is, no doubt, quite true, but upon what principle is that done? It is upon the principle that the Court can control the proceedings before itself, and if a person without authority is bringing an action in the name of another it is an abuse of the process of the Court, and the Court can stop it. That seems to me not to apply to a case of this kind, and I think that this is not the right way of raising the question whether Mr. *Cross* has authority to go on. He must go on at his peril. If we were to grant an injunction we should be reintroducing the course taken by Lord *Cottenham* in 1851, which has been abandoned ever since *East and West India Dock Company* v. *Gattke* (2). It appears to me that this order ought to be discharged.

FRY, L.J.:—

I also feel myself unable to agree with the conclusion of the learned Judge. The injunction in this case has been granted upon two propositions: first, that the Defendant *Cross* had no authority to proceed under sect. 6 of the *London and Blackwall Railway* (*Steamboats*) *Act*, 1873, in making a claim under that section in the name of the ferry company; and secondly, that if *Cross* had no such authority to proceed as agent or attorney of the company he ought to be restrained by the injunction of this Court. Of course both those propositions are denied by the Defendant. With regard to the first of those propositions, I do not intend to express any conclusion, but I would only say that I do not proceed, in the conclusion in which I have arrived, upon any

(1) 11 Q. B. D. 30. (2) 3 Mac. & G. 155.

supposition that the Plaintiffs are wrong in their contention that *Cross* had no authority. As far as I can gather, the notice *Cross* gave was bad, but I do not desire to express a conclusive opinion on the question, which may be the subject of judicial decision hereafter. Assuming, therefore, that the Plaintiffs are right in their first proposition, then are they right in their second, that if *Cross* had no authority to proceed in the name of the ferry company he ought now to be restrained by an injunction? The case made is a case of false representation on the part of the Defendant. If that case be true, it follows that the notice which *Cross* has given in the name of his alleged principal is a nullity, that any award made in pursuance of that notice will be futile, and that any action which may be brought to enforce that award by the company or by *Cross* in their name must fail, and be dismissed with costs. It appears to me that the right time to determine the question whether that award can be enforced or not is the time when that action is tried. It is to be observed that this is not a case in which there has been a false assumption of authority in respect of a proceeding in the Court itself. That class of cases, in my judgment, is totally distinct from any other class of cases of the false assumption of authority. In that class of cases the Court stays the proceedings because it finds that there has been an abuse of its own process, and because it has a duty to keep its records truthful and prevent proceedings taken before it from being other than what they are represented to be. But in my judgment the Court has no general jurisdiction to restrain by injunction the false assumption of authority. I do not see why, if we interfere in this case, we should not interfere in every case in which *A.* erroneously represents that he is the agent of *B.*, and as such makes a claim against *C.* It is remarkable that no authority can be produced to shew that the Court ever has granted an injunction in cases of that description. In my judgment the practice and procedure of the Court do not favour the conclusion that there is any such general jurisdiction to interfere by injunction upon a false assumption of authority, and I think that such an assumption of jurisdiction would be entirely wrong, because it would be calling upon the Court to interfere in a very large number of cases, many of which may be

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trivial, and many of which would never come to anything if the Court allowed the matters to go on. In my judgment the time to try the question of authority is when proceedings are taken on the footing of acts done by the claimant or the claim is made by the claimant.

The authorities to which Lord Justice *Lindley* has referred shew that there is a strong analogy in favour of the principle I have laid down. In the case of the *Lands Clauses Act*, where claims are falsely made by persons who assert that they have a right under the Act, the course of the Court has been, not to pick out, so to speak, the particular question of authority and determine that upon injunction, but to leave the whole matter to be determined in an action to be brought on the award which is the result of the proceedings under the Act. That course of procedure has been authorized by the recent decision in *North London Railway Company* v. *Great Northern Railway Company* (1), on which Mr. *Pollard* relies. I conclude, therefore, that this case, assuming Mr. *Cross* falsely alleges he is the agent of the company, is not a case in which the Court can or ought to interfere by injunction at this stage of the proceedings.

Another argument was thrown out, but not emphasised, by Mr. *Romer*, that this is a case of maintenance. It is enough for me to say that, in my judgment, this is not a case of maintenance. Mr. *Cross*, for anything I can see or know, honestly believes he has a right to represent the company, and he seems to be a person largely interested in the matter in controversy. I cannot consider for a moment that this is a case which can be brought within the law of maintenance, and that we can, on that ground, restrain Mr. *Cross* from proceeding. I think, therefore, that this appeal must be allowed, and the original order must be discharged.

LOPES, L.J.:—

Mr. Justice *Chitty* granted an injunction in this case to restrain the Defendant from proceeding to arbitration under a notice, dated the 5th of November, 1885, and from using the name of the *Poplar and Greenwich Ferry Company* for the purpose of that

(1) 11 Q. B. D. 30.

arbitration. The main question that has been raised in this case is, whether the Court had power to grant that injunction. It appears to me that this case falls in principle within the decision in *North London Railway Company* v. *Great Northern Railway Company* (1). There is, no doubt, a distinction with regard to an assumption of authority, but the present case seems to me still to fall within the principle of that decision. As I understand that case, it has decided that however futile and vexatious the arbitration may be, there was no jurisdiction to grant an injunction to restrain it, that there was no power to grant such an injunction before the *Judicature Act*, and that the 25th section, sub-sect. 8 of the *Judicature Act* has not extended the power.

Mr. Justice *Chitty*, in his judgment, appears to distinguish the present case from the case to which I have referred, on the ground that there was here a false assumption of authority by *Cross*, and he treats the case as analogous to a case where a person is made plaintiff or defendant in an action without his authority in a proceeding before the Court. It does not appear to me that the analogy is correct, for there the Court would strike out the name of the plaintiff or defendant, or stay the proceedings, as the case might be, on the ground that it had full authority to prevent any abuse of its own proceedings. Here the arbitrators are an independent tribunal, and I think that disposes of the distinction which is made by Mr. Justice *Chitty*. But even if there was jurisdiction to grant an injunction in this case, I think it would be premature to interfere by injunction. It appears to me that the claimant ought to be left to bring his action on the award. If he brings such an action, he will fail if he is unable to make out a legal claim, and the very worst, it appears to me, that can happen to the company will be, that they will have to pay their own costs of the arbitration. Surely that is not a ground for interfering by injunction at this stage of the proceedings. I think, therefore, that this appeal ought to be allowed.

Solicitors for the company: *Hollingsworth, Tyerman, & Andrewes.*
Solicitors for Defendant: *Cattarns, Jehu, & Hughes.*

(1) 11 Q. B. D. 30.

H. C. J.

C. A.
1886
Jan. 27

LEITCH *v.* ABBOTT.

[1884 L. 3076.]

Practice—Discovery—General Allegation of Fraud—Agent—Pleading—Rules of Supreme Court, 1883, *Order* XIX., *r.* 6; *Order* XXXI., *r.* 20.

The Plaintiff alleged that he had employed the Defendant as a stock-broker, but that the Defendant had in many of the transactions dealt with himself as principal, and had also charged the Plaintiff with moneys not paid. The Plaintiff delivered interrogatories asking for the particulars of the dealings on behalf of the Plaintiff and the names of the persons with whom the Defendant had dealt and the amounts paid. The Defendant refused to answer on the ground that the Plaintiff was not entitled to this information until after decree:—

Held, by *Cotton* and *Bowen* L.JJ. (*dubitante Fry*, L.J.), that though there were no particulars of the frauds alleged, the Plaintiff was entitled to discovery in order to enable him to give details of the frauds alleged:—

Per Bowen, L.J., Order XIX., rule 6, is a rule of pleading only.

Whyte v. *Ahrens* (1) discussed.

THIS was an action by *J. A. Leitch* against *J. N. Abbott*, in which *Leitch* alleged that he had employed *Abbott* as his stock-broker in the purchase and sale of shares and securities; that *Abbott* had in breach of the terms of his employment acted as principal in many of the transactions in which he was employed by *Leitch*; and had charged *Leitch* with moneys not paid and with sums in excess of the market prices; and *Leitch* claimed an account and payment of what should be found due, and damages.

The Defendant indirectly admitted that he had been so employed, but denied all the allegations of having dealt with himself as principal and all other improper conduct; and said that the Plaintiff had accepted full accounts of all the dealings.

The Plaintiff delivered interrogatories:—

2. "Set forth a list of all dealings, contracts, and transactions in stocks, shares, or securities, whether in the shape of purchases, sale, or carryings over of the same, which were actually effected by you as broker for or on behalf of the Plaintiff, with dates, giving the exact hour of the day in each case, and prices at which the same respectively were effected."

(1) 26 Ch. D. 717.

3. Asked for the names of the dealers and the amount of money paid or received and of commission in each case.

4. Asked whether in any of the cases the Defendant dealt with himself or any firm in connection with him, and what profits were thereby made.

The Defendant said: "I decline to answer these interrogatories on the ground that the Plaintiff is not entitled to the information until after the decree (if any) made in this action."

The Plaintiff took out a summons for further and better answers.

Chitty, J., refused to make the order, and the Plaintiff moved by way of appeal that the Defendant might be ordered to make further and better answers.

Jelf, Q.C., and *Woodfall*, for the Plaintiff:—

The Defendant was an agent, and knows what he has done; the Plaintiff does not know, but has a right to be told. The Defendant denies generally that he has bought and sold from and to himself, but he does not give us the names of the persons with whom he dealt, so that we may test the truth of his statement: Rules of Supreme Court, 1883, Order XXXI., rule 20.

Solomon, for the Defendant:—

The Plaintiff alleges fraud, but generally only; that is not enough, and he must give instances of what he alleges to be fraud: Order XIX., rule 6. The Defendant has denied generally, and that is all he can do or ought to be required to do: *Whyte* v. *Ahrens* (1).

Jelf, in reply, referred to *Wigram* on Discovery (2).

[FRY, L.J.:—Ought you not to have alleged particular instances of fraud?]

The Plaintiff has a right to know with whom the Defendant dealt. The Defendant would as a witness be obliged to answer.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Chitty*. We have no note of his reasons, but he decided that the Plaintiff was

(1) 26 Ch. D. 717. (2) 2nd Ed. § 26.

C. A. 1886 LEITCH v. ABBOTT. Cotton, L.J.

not entitled to any further answer from the Defendant to the interrogatories numbered 2, 3, and 4.

The Plaintiff's case is that he employed the Defendant to act as his agent in buying or selling stocks and shares from or to third persons, but that the Defendant really acted for himself as seller or buyer at the time when he purported to act as the Plaintiff's agent. The Defendant denies the Plaintiff's allegations, and says that he always acted as agent. The Defendant's answer to these interrogatories must be very material in determining at the trial of the action whether the Defendant did act as principal or as agent, and on ordinary principles therefore the Defendant ought to give the discovery required.

On what ground, then, does the Defendant decline to answer the interrogatories? He says, "I decline to answer these interrogatories on the ground that the Plaintiff is not entitled to the information until after the decree (if any) made in this action." But here the information asked for is required to enable the Plaintiff at the trial to establish his right to relief. That ground of objection, therefore, cannot prevail. It would be idle to give the discovery after the trial only. Then it is said that rule 20 of Order XXXI. gives the Judge a discretion. If that rule does apply to the present case I think the discretion has been wrongly exercised. Now rule 20 says:—[His Lordship read the rule.] If, then, this discovery is required for the purpose of ascertaining the Plaintiff's rights at the trial, it does not come within the first part of the rule. The contention of the Defendant comes to this, that the Judge is to decide whether he did or did not act in violation of his duty before he gives the discovery. It is said that *Whyte* v. *Ahrens* (1) is an authority for this proposition. The Defendant cannot, however, well rely on my judgment in that case, for, if the Judge had a discretion, I think it has been wrongly exercised here. But no doubt Lord Justice *Fry* did in that case think that fraud being alleged by the Plaintiff, particulars of the fraud ought to have been given before he could be entitled to discovery. Is that the effect of rule 6 of Order XIX.? There is here a general allegation of fraud, and the Plaintiff wants the discovery to enable him to prove his allegation. It may be that he will afterwards have to amend his pleadings,

(1) 26 Ch. D. 717.

but to say that he must give details of the fraud in the first instance would be to reduce the right of discovery in cases of fraud to very narrow limits indeed. I do not, however, think that that case applies, for there is here a statement of the nature of the fraud alleged. The Plaintiff may hereafter have to condescend to particulars, but, in my opinion, it would be wrong to say that he is not entitled to have this discovery now, because he has not given full details of the fraud which he alleges. We may possibly have to decide to what extent the Defendant is obliged to go into all these matters, but, in my opinion, it would be wrong to say that the Court has a discretion to deprive the Plaintiff of discovery altogether, either until the trial of the action, or until he has given details of the fraud which he alleges. He wants the discovery in order to enable him to give those details, and to establish his right to relief at the trial. I think, therefore, that the Defendant must give a further answer to the interrogatories 2, 3, and 4.

BOWEN, L.J.:—

I will assume that the Plaintiff is met with an allegation of a settled account which throws upon him the obligation of proving fraud on the part of the Defendant, but it does not deprive him of the right to obtain discovery from the Defendant, so as to enable him to prove the fraud. That is the general principle, and it is well expressed in a passage which has been cited from *Wigram* on Discovery (1): "It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial." In the present case the Plaintiff's right to discovery arises, not out of fraud, but out of the relation of principal and agent. It is true that the discovery is wanted for the purpose of proving the fraud, but the right to it does not depend on that. Does, then, this case fall within the exceptions mentioned in rule 20 of Order XXXI.? What is the object of that rule? The object, as it seems to me, is perfectly clear. It often happens that one party to an action makes an allegation of

(1) 2nd Ed. § 26.

C. A. 1886 LEITCH v. ABBOTT. Bowen, L.J.

some fact, such as the existence of a partnership or an agency, which is disputed by the other party. If the allegation is true, the right to discovery would follow; if it is not true, there would be no right to discovery. The framers of the rules saw how ridiculous it would be if they did not give a power for the defendant to refuse discovery until the right of the plaintiff to have it had been established. Therefore rule 20 enables the Judge to sever the trial of the issue of facts from the trial of the right to discovery. But in the present case it seems to me that rule 20 does not apply. The Judge could not properly say that he was satisfied that the right to discovery depended on the determination of any issue or question in dispute in the cause. The discovery is wanted for the determination of the issue in the action. Nor could it be said that for any other reason it was desirable that the issue in dispute should be determined before deciding upon the right to discovery. Therefore I do not think that rule 20 applies, and if the Judge was exercising any discretion I think he applied the rule wrongly. But I do not believe that Mr. Justice *Chitty* intended to decide the case as a matter of discretion under rule 20.

Then arises the question on which Lord Justice *Cotton* and Lord Justice *Fry* are not entirely at one, and I am, therefore, obliged to state my own view. I do not think it necessary to say anything in order to shew that the old rule of pleading is a good rule—that, in order to open a settled account, specific errors in the account must be stated. In the case of *Parkinson* v. *Hanbury* (1), Lord *Cranworth* added to what Lord *Westbury* said: "I think without wishing to hold parties strictly or technically to the rule, the substance of it ought always regularly and rigidly to be insisted upon." Without expressing any opinion which of the two learned Lords stated the rule more accurately, I think rule 6 of Order XIX. is only a rule of pleading, and I believe that this has been so decided by the Court of Appeal. Though the omission of one party to comply with the rule gives a right to the opposite party to complain, yet it is an error in pleading and nothing more, and I should be prepared so to decide, if the point had not already been decided. Ought, then, the generality of an

(1) Law Rep. 2 H. L. 1, 12.

allegation of fraud to be a bar to the right to discovery? It seems to me that the very fact that the pleader is unable to plead except in general terms, is in many cases the very reason why he should have discovery from the other party, so as to enable him to plead the fraud in detail. If at a particular stage of an action you are stopped by reason of your ignorance of some fact which is known only to the other party, that is the very reason why you should have discovery of that fact from him, and what difference does it make whether you are stopped at the trial or before? I say this in order to shew that rule 6 of Order XIX. is only a rule of pleading, and we ought not, I think, to scan the pleadings too narrowly upon a question of the right to discovery. But being of opinion that in the present case the relation of principal and agent is the real ground of the Plaintiff's right to discovery, I cannot see that we ought to deprive the Plaintiff of the discovery which he wants in order to enable him to frame his case.

FRY, L.J.:—

I will only say that the inclination of my opinion is in favour of the judgment of the Court below.

Solicitors for Plaintiff: *Goldberg & Langdon.*
Solicitor for Defendant: *L. Barnett.*

C. M.

C. A.
1886
Jan. 26, 28.

SCOTNEY *v.* LOMER.

[1883 S. 1494.]

Will—Vesting—Postponement of Enjoyment of Principal—Interim Gift of Income—Appointment to Second Set of Trustees—Acquiescence.

Property was assigned to trustees in trust for *S.* for life, and after her death to such of her issue as she should by will appoint. *S.* by her will appointed two-fifths of the property to two trustees, of whom *N.* was the survivor, in trust to pay the income to her son till he should attain the age of forty years, and then in trust for her son, his executors and administrators; provided that in case her son should assign his share in the property, then the appointment for his benefit should be void, and the two-fifths should be held in trust for the other objects of the power. The son died under the age of forty without having assigned his share, leaving a will of which *B.* was executor. After the death of *S.*, *L.* and *N.* were appointed trustees of the original settlement. *N.* afterwards (with the consent of the son's executor) obtained possession of the son's share. Subsequently *N.* misappropriated the fund.

The persons beneficially interested under the son's will recovered judgment against *B.* for wilful default in allowing the property to remain in *N.*'s hands; and *B.* being dead, his executor brought an action against *L.* to make him liable for the loss of the fund:—

Held, by *North*, J., and the Court of Appeal, on the construction of the will of *S.*, that the beneficial interest in two-fifths of the property vested absolutely in her son and passed by his will.

Held, by *North*, J., that *S.* had power to appoint the property to trustees for her son, and that as he took the whole beneficial interest the trustees of the settlement had no duties to perform and were justified in handing over the property to *N.* as the surviving trustee of the will, and that *L.* was not liable for having allowed it to remain in *N.*'s hands.

Held, by the Court of Appeal, that inasmuch as the son of *S.* had the absolute interest in the fund, and *B.*, his executor, had consented to its being paid to *N.*, neither *B.* nor his personal representative could recover against *L.*, the trustee of the settlement, on the ground of wilful default.

But whether in a suit by beneficiaries under the son's will the trustees of the settlement would be held to have been justified in handing over the property to the trustees of *S.*'s will, *quære*.

Busk v. *Aldam* (1) recognized.

THIS was an appeal from the decision of Mr. Justice *North* (2).

The principal question turned on the construction of an indenture of settlement of the 27th of September, 1849, made by

(1) Law Rep. 19 Eq. 16. (2) 29 Ch. D. 535.

Wilson Lomer on his daughters. The provisions of the settlement were fully set out in the previous report. The effect of them may be shortly stated as follows:—The settlor assigned, and covenanted to assign, certain sums of money and securities to *C. Simonds* and *A. S. Greene* upon trust to hold the same and the produce upon trust during the life of his daughter *Louisa Sowdon*, the wife of *Harry Sowdon*, to pay the annual income to her for her separate use, and after her death in trust for all or such one or more exclusively of the other or others of the issue of *Louisa Sowdon*, in such shares, &c., and upon such conditions and with such restrictions and in such manner as *Louisa Sowdon* should by will appoint; and in default of appointment, in trust for all the children of *Louisa Sowdon*, if sons, at twenty-one, and if daughters at twenty-one or marriage; with the usual hotchpot clause. And it was thereby declared that it should be lawful for *Wilson Lomer* (the settlor) and *Louisa Sowdon*, or the survivor of them, to appoint new trustees of the settlement. The settlement also contained a power to *Wilson Lomer* to revoke the settlement, which however he did not execute.

Louisa Sowdon died in 1858, having by her will appointed that the funds subject to the trusts of the settlement should after her death be held by her husband *Harry Sowdon* and *William Henry Newman* as to three-fifths thereof upon certain trusts for the benefit of her daughter *Catherine Sowdon*, afterwards *Catherine White*; and as to two-fifths thereof in the following terms: "Upon trust to pay the interest, dividends, and annual income thereof by quarterly payments, or in such other manner as my said trustees or trustee shall think proper, unto my son *William Henry Sowdon* until he shall attain the age of forty years, and when and as soon as he shall attain that age then I direct that the said trust moneys, stocks, funds, and securities shall be held by my said trustees, or the trustees or trustee for the time being of my will, in trust for my said son *W. H. Sowdon*, his executors and administrators." Then followed a proviso that it should not be lawful for her said son to sell, assign, or incumber (except by will) his said share or any part thereof: "Provided also, that in case my said son shall at any time sell or assign or part with his said share of and in the trust moneys, funds, and securities, then I direct and appoint that

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the appointment hereinbefore made to him of the said two-fifth parts of the said trust moneys, stocks, funds and securities, and the interest, dividends, and income thereof, shall immediately thereupon be void and of no effect; and then and in that case I do hereby direct and appoint that the same share of the said trust moneys, stocks, funds, and securities, and the interest, dividends, and income thereof, shall be held by my said trustees or trustee upon the trusts and for the intents and purposes hereinbefore declared for the benefit of my said daughter *Catherine Sowdon* and her assigns with reference to the other three-fifths of the said stocks, funds, and securities thereinbefore appointed to her as aforesaid." *Harry Sowdon* and *W. H. Newman* proved the will, and soon afterwards *Harry Sowdon* died leaving *W. H. Newman* the sole trustee of the will.

In 1866 *Wilson Lomer*, in exercise of the power reserved in the settlement, appointed *Edward Lomer* and the said *W. H. Newman* trustees of the settlement in the place of *Simonds* and *Greene*, and all the funds and property subject to the trusts of the settlement were transferred to *Edward Lomer* and *W. H. Newman*.

In 1869 *William Henry Sowdon*, who was alive at the date of the original settlement, died under the age of forty years, having by his will devised and bequeathed all his estate and effects to *William Best* and *E. S. Halladay*, whom he appointed his executors upon certain trusts. *Halladay* was a clerk of *Newman's*, and died in 1881.

The three-fifths appointed for the benefit of *Catherine White* were transferred to the trustees of her marriage settlement; and, after the death of *W. H. Sowdon*, *Best*, who was his acting executor, and *Lomer*, permitted *Newman* to get possession of the funds representing the two-fifths appointed in trust for *W. H. Sowdon*. *Newman* misappropriated those funds and his estate was entirely insolvent.

The circumstances under which these funds were transferred to *Newman* or under his control did not appear clearly in the evidence, but the Defendant *Lomer* in his answer to interrogatories stated as follows: As to a part of the funds, he said, "such transfer was not made to the Defendant *Newman*, but was made by his direction as the surviving trustee of the will of *Louisa Sowdon*,

and because he was the proper person to have the control of it, and there was, considering that he was duly accounting to the executors and trustees of the will of *W. H. Sowdon*, no reason why I should retain any longer any control over it." And as regards the rest of the fund, which in fact came into the names of *Lomer* and *Newman*, he said: "I allowed the Defendant *Newman* to obtain possession or control of the said money or investments as the surviving trustee of the will of *Louisa Sowdon*, and because he was the proper person to have such possession and control, and was in constant communication with Messrs. *Best* and *Halladay*, the executors and trustees of the will of *William Henry Sowdon*, to whom the Defendant *Newman* himself was bound to account, and with whom I had every reason to believe he could duly account or had accounted."

In the year 1872, *Best* took in his residuary account, which was made out as an account between "*W. H. Newman*, the surviving trustee of the will of Mrs. *Louisa Sowdon*, in account with Messrs. *Best* and *Halladay*, executors of the will of Mr. *W. H. Sowdon*."

The persons beneficially interested under the will of *W. H. Sowdon* brought an action against *Best* for negligence and wilful default in allowing the funds to remain in *Newman's* hands, and obtained judgment accordingly. On the accounts being taken the estate of *Best*, who had died during the proceedings, was found liable for upwards of £5000.

An action having been brought to administer *Best's* estate, *Scotney*, who was *Best's* executor, by leave of the Court, brought the present action against *E. Lomer* and *W. H. Newman* praying a declaration that they were jointly and severally liable to make good and restore the trust funds which had been made away with.

Mr. Justice *North* held that on the construction of the will the beneficial interest in two fifth shares vested in *W. H. Sowdon* absolutely, and passed by his will; that *Louisa Sowdon* had power to appoint the property to trustees for her son, and that as the whole beneficial interest vested in him, the trustees of the settlement were justified in handing over the property to *Newman* as the surviving trustee of the will; and therefore *Lomer* was not liable for permitting it to remain in his hands. His Lordship

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therefore gave judgment against *Newman*, but dismissed the action against *Lomer* with costs.

The Plaintiff appealed from this judgment so far as the action was dismissed against *Lomer*.

W. W. Karslake, Q.C., and *Dickinson*, for the Appellant:—

The Respondents object to our claim on the ground that *Best* acquiesced in the payment of the funds to *Newman*, and therefore has no equity against *Lomer*. But in the first place there is no acquiescence proved; and in the second place the Plaintiff does not only represent *Best*, but the estate of *Sowdon*.

Newman had no authority to receive the funds. Mrs. *Sowdon* had no power to appoint new trustees of the fund, she had only power to designate the persons to take the beneficial interest and in what shares and manner they were to take it: *Busk* v. *Aldam* (1); *Ferrier* v. *Jay* (2); *Cowx* v. *Foster* (3); *Kenworthy* v. *Bate* (4); *Von Brockdorff* v. *Malcolm* (5); *Trollope* v. *Linton* (6); *Fowler* v. *Cohn* (7); *Fearne's* Posthumous Works, "Cases and Opinions" (8). It might have been different if the appointment to *W. H. Sowdon* had been absolute and indefeasible. But it was not so: *Batsford* v. *Kebbell* (9). If he had attempted to alienate his interest the gift over would have taken effect. Therefore until he attained the age of forty, there were duties for the trustees of the settlement to perform. And as he never attained that age the capital never vested in him under the appointment, but devolved on him under the settlement as in default of appointment; his sister being precluded by the hotchpot clause from taking any of it. That being so, the trustees of the will had nothing to do with it.

Barber, Q.C., and *Maidlow*, for *Lomer*:—

This is not an action by the beneficiaries to compel the trustees to replace the fund; that right has been established in another suit; the Plaintiff represents *Best*, whose negligence was the

(1) Law Rep. 19 Eq. 16.
(2) Ibid. 10 Eq. 550.
(3) 1 J. & H. 30.
(4) 6 Ves. 793.
(5) 30 Ch. D. 172.
(6) 1 S. & S. 477.
(7) 21 Beav. 360.
(8) Page 320.
(9) 3 Ves. 363.

cause of the loss. It is an attempt by one trustee to obtain indemnity from his co-trustee on the ground that the co-trustee was the person who committed the breach of trust. He cannot do this; *Best* was guilty of gross negligence, though not of fraud, and he acquiesced in the payment of the funds to *Newman*. He has no equity to claim indemnity from him.

Mrs. *Sowdon* had power to appoint to trustees for the benefit of her son. The power is framed in as wide a form as possible. She had power to appoint "in such manner" for the benefit of her children as she pleased. But in fact the appointment to *W. H. Sowdon* amounted to an absolute gift. The gift of the capital vested immediately, but the enjoyment of it was postponed till he attained the age of forty. And in the meantime all the income was given to him. It was, no doubt, defeasible if he attempted to alienate it before he came to that age, but that event did not happen, and the power in the settlement was completely exhausted by the appointment. Therefore there was no duty remaining for the trustees of the settlement to perform but to hand the funds over to the trustees of Mrs. *Sowdon's* will: *In re Bunn* (1); *In re Hart's Trusts* (2). It is the ordinary course where a father appoints the share of a daughter on her marriage to hand over the fund to the trustees of her settlement.

W. W. Karslake, in reply.

COTTON, L.J. (after shortly stating the effect of the settlement and will and the subsequent facts, continued):—

It is material in the view that we take of this case to consider in what position the Plaintiff stands. Is he to be considered as representing the parties interested under Mr. *Sowdon's* will, and therefore as the beneficiary in respect of this fund, or is he suing here as representing *Best's* estate, against whom the judgment was obtained? In my opinion he must be considered as representing *Best*, and that the action here is not to recover a fund for the benefit of the beneficiaries claiming under *William Henry Sowdon*, but to increase the estate of *Best*, the action being brought by his personal representative, and by leave of the Court in a suit

(1) 16 Ch. D. 47. (2) 3 De G. & J. 195.

C. A. 1886 SCOTNEY v. LOMER. Cotton, L.J.

to administer his estate. Mr. Justice *North* decided this case on this ground, that the trustees appointed by Mrs. *Sowdon* were entitled as a matter of law to receive the fund from the trustees of the original settlement, and under the power given by Mrs. *Sowdon's* will to give a good receipt for it. I do not think it necessary under the circumstances of this case to decide that question. Certainly I express no opinion in any way at variance with what is possibly the only decision on that point, namely, *Busk* v. *Aldam* (1), which was before Vice-Chancellor *Malins*. But what was the right and interest of *Sowdon* under the appointment? In my opinion he took a vested interest in the event which happened and the absolute right to the property. It was contended that it was a mere contingent interest in him if he attained the age of forty, and as he never attained that age he took in default of appointment under the trusts of the original settlement. But in my opinion to come to such a conclusion would be at variance with the principle laid down by the Lords Justices, and especially Lord Justice *Turner*, in *In re Hart's Trusts* (2). The whole of the two-fifths which were appointed to *William Henry Sowdon* were to be applied in the discretion of his trustees for his maintenance till he attained the age of forty, and then the fund was to be held in trust for him. It is true that if he attempted to dispose of it there was a gift over, but I think we ought to consider that as applying to the period before he attained forty, and he never attempted anything of that kind. What Lord Justice *Turner* says in *In re Hart's Trusts* is this (3), "There is here, therefore, not merely a trust to pay the legacy when the legatee attains twenty-five, but a direction that the legacy is to carry interest, which is to be applied for the maintenance of the legatee. The gift is not of maintenance merely, but of the whole interest. The legatee therefore was in this position, she was to be paid the legacy when she attained twenty-five, and to take the interest in the meantime. Both the principal and the interest are appropriated to her." That exactly applies here, subject of course to that proviso that if the legatee attempts to alienate then it is given over, but as he did not do so there was an appropriation for his benefit from the time of Mrs.

(1) Law Rep. 19 Eq. 16. (2) 3 De G. & J. 195.
(3) 3 De G. & J. 201.

Sowdon's death of the principal, and also of the interest. Therefore in my opinion there was here an absolute appointment in the events which happened to the son.

Then the question was very much argued whether the donee of such a power as Mrs. *Sowdon* had could appoint trustees to receive the trust fund from and give a discharge for it to the trustees of the settlement under which the special power was given. I do not think it is necessary to decide that point, because, assuming that there was no such right, yet there is an absolute appointment, and if, with the consent and concurrence of the person in whose favour the absolute appointment is made, or of his representatives, the transfer is made to the trustee named by the donee of the power of appointment, that transfer cannot be afterwards disputed. What we find in the present case is this, that after the death of *W. H. Sowdon* in 1874 there was a transfer executed which enabled *Newman* to obtain possession of the property, and the only evidence on the subject is contained in the answer to interrogatories of the Defendant *Lomer*. [His Lordship read the passages from *Lomer's* answer set forth above, and proceeded:—] That would not of itself be sufficient, but what we find is this, that in the year 1872 *Best* took in his residuary account, and in that there is an admission of a balance shewn by the principal account thereto annexed. Then when we look at that account we find it is an account between *W. H. Newman*, surviving trustee of the will of the late Mrs. *Louisa Sowdon*, in account with Messrs. *Best* and *Halliday*, executors of the will of the late Mr. *W. H. Sowdon*; so there he is by this account, which is sent in by him, and undoubtedly recognised by him, treating *Newman* as the person to whom the moneys are to be paid by the trustees of the settlement, and that, I think, appears very clearly when we look down the account, for there we find the sums in question in this action mentioned as being sums to be received from the trustees of the settlement, but not to be received by the executors of *Sowdon*. Therefore assuming, as I do for the purposes of my judgment, that the mere appointment of trustees, with power to give receipts, would not justify the payment to them of funds subject to and in the power of the trustees of the original settlement, yet the payment to a person appointed

C. A. 1886 SCOTNEY v. LOMER. Cotton, L.J.

trustee by the donee of the power, if the payment be made with the consent of the party entitled beneficially under the appointment, would undoubtedly be a good transfer. As Mr. *Barber* said in his argument, it happens every day on the marriage of a child that where there has been a settlement on the marriage of the father and mother, there is a settlement of the share of the child, and with the concurrence of that child, and if she is a lady under age until lately with the concurrence of her husband, her share is handed over to new trustees. Undoubtedly, if this could be considered as an action brought by the beneficiaries under *Sowdon's* will, there would be difficulty in giving effect to that recognition by *Best* and *Halliday* of the new trustee, unless that trustee, by the mere fact of his appointment, was entitled to receive the fund from the trustees of the original settlement. But, as I have before said, this must be looked upon as the action of *Best's* representative, and when he has, as is shewn by that account, dealt with *Newman* as if he were the person to account to him, it would be wrong to allow *Best*, through his representative, to call on one of the trustees of the settlement to make good the moneys which got to *Newman's* hands when he, *Best*, had recognised *Newman* as the party entitled to receive and the person accountable to him for these moneys.

In my opinion therefore, although I do not take quite the same view as Mr. Justice *North*, this appeal must fail.

BOWEN, L.J.:—

A great portion of the argument in this case was devoted to the discussion of a matter on which it is unnecessary, in my opinion, to pronounce a judgment.

I think this case must be decided on the point last made for the Respondents, that there has been in this case such a consent and acquiescence on the part of *Best* to the transfer of this fund to *Newman* that it is impossible now for the Plaintiff *Scotney*, who represents *Best*, to be heard to complain of the transfer. The only point of law really which arises is the point which is concerned with the nature of the interest attained by *Sowdon* under Mrs. *Sowdon's* will, because it is necessary to see what was the nature of *W. H. Sowdon's* interest in this fund. It appears to me

that as soon as we have decided that all that remains is the mere question of fact.

What was the interest taken by *W. H. Sowdon* in Mrs. *Sowdon's* will? Was it a gift to him at the age of forty contingent on his surviving that age, or was it a present gift? That seems to me to be a pure question of construction. We have the advantage of the construction which in *In re Hart's Trusts* (1) the Court put on a similar clause; and applying similar reasoning, which reasoning commends itself to our sense of what is right, and in fact is an authority to guide us, I cannot help thinking there can be very little doubt that the interest taken by *Sowdon* under Mrs. *Sowdon's* will was a vested interest, and that in the events which have happened there was an absolute appointment by her to her son.

Then upon the other question. I will not go through what Lord Justice *Cotton* has said, because there can be no object in my saying imperfectly what he has put so perfectly in his judgment. The transfer was with the authority of *Best*, and assuming that we arrive at the conclusion, which we do arrive at, that this is not an action by beneficiaries under *Sowdon's* will, it would be unjust to allow *Scotney* in this action to complain of what was done with *Best's* authority and sanction.

I therefore think that, though upon different grounds, the judgment of Mr. Justice *North* must be affirmed. The point which has been made, and on which our judgment turns, is a point which was raised in the Court below. It appears from the report in the Court below (2) that Mr. Justice *North* did not give effect to it, but he seems not to have been perfectly instructed upon the materials before him as to the real character of this action. He seems to have thought it was an action maintained in the interest of the beneficiaries under *Sowdon's* will. If he had not taken that view, but had taken the view which we take, he must have also come to an adverse decision to the Plaintiff.

FRY, L.J.:—

Upon the question of the construction of Mrs. *Sowdon's* will, and upon the other question as to the Plaintiff's incapacity to maintain this action after what took place in the lifetime of *Best*,

(1) 3 De G. & J. 195. (2) 29 Ch. D. 535.

C. A. 1886 SCOTNEY v. LOMER.

I have nothing to add to what has been said by my learned Brethren, except to express my entire concurrence with their views. As to the other questions which were discussed in the judgment of Mr. Justice *North*, I neither express assent or dissent. I agree, therefore, that this appeal must be dismissed with costs.

Solicitors: *Stocken & Jupp; Lambert, Petch, & Shakespear.*

M. W.

C. A. 1886 *Jan.* 29, 30.

BAHIN *v.* HUGHES.

[1882 B. 6701.]

Trustee—Breach of Trust—Improper Investments—Liability of Husband for his Wife's Breach of Trust—Right to Indemnity by co-Trustee.

A husband's liability for his wife's breaches of trust extends to breaches of trust arising from negligence, and is not confined to losses caused by her active misconduct.

Where there are two trustees and the management of the trust is left in the hands of one, and the acting trustee commits a breach of trust, the passive trustee is not entitled to an indemnity from the acting trustee, unless there are some special circumstances, as where the acting trustee is the solicitor for the trust, or has derived a personal benefit from the breach of trust.

Lockhart v. *Reilly* (1) and *Thompson* v. *Finch* (2) distinguished.

ROBERT HUGHES, by his will, made in 1867, bequeathed the sum of £2000 to *Eliza Margaret Hughes*, *Sarah Jane Hughes*, afterwards the wife of *James Burden*, and *Frances Mary Hughes*, afterwards the wife of *Edward Edwards*, upon trust to invest in certain securities thereinafter mentioned, including *Mersey Docks and Harbour Board* bonds, and on real securities in *England* and *Wales*, and to pay the income to the Mrs. *Bahin* for life for her separate use, and after her death for her children. The testator died in 1868. The sum of £2000 was at first invested in *Mersey Docks and Harbour* bonds, but in September, 1880, the *Mersey Docks Company* gave notice to the trustees that they intended to reduce the interest, and that they might either receive the money or take a new bond at a reduced rate.

(1) 25 L. J. (Ch.) 697. (2) 8 D. M. & G. 560.

Miss *Eliza M. Hughes*, who managed the business as the acting trustee, wrote to Mrs. *Edwards* advising her co-trustees to accept payment of the money and to reinvest it on mortgage.

Mrs. *Edwards* at first refused to accept repayment of the money, but eventually, after some correspondence, she and her husband and also Mr. and Mrs. *Burden* signed a receipt for the money and gave an authority to Miss *Hughes* and Mr. *Burden* to receive the money from the *Mersey Docks Company*. The sum of £2000 was accordingly paid to Miss *Hughes* and Mr. *Burden*.

Mr. *Edwards* afterwards denied that he had signed the letter authorizing the payment of the money by the company to *Burden* and Miss *Hughes;* but the Court held on the evidence that he had signed it.

On the 14th of September, 1880, Miss *Hughes* wrote to Mrs. *Edwards* as follows:—"Mrs. *Bahin* would wish her money to be invested on mortgage, and when a suitable one has been found particulars will be sent to the trustees."

On the 2nd of November, 1880, Miss *Hughes* wrote to Mrs. *Edwards* as follows:—

"A mortgage investment for the £2000 belonging to *Kate* (Mrs. *Bahin*) and her children has been lent on eight houses at *Wood Green, Middlesex*, at 5 per cent. interest. I am writing to *Kate* to-day on the subject."

The letter to Mrs. *Bahin* of the same date was as follows:—

"Miss *Hughes* writes to inform Mrs. *Bahin* that a mortgage investment for the £2000 has been found on eight leasehold houses situate at *Wood Green, Middlesex*, at 5 per cent. interest. The houses are let at a rental of £36 per annum. Should the borrower fail to pay the interest the trustees have secured to themselves power to sell the property, but twenty-one days are always allowed after the money is due."

The money was accordingly shortly afterwards re-invested by Miss *Hughes* and Mr. *Burden* on the proposed mortgage of leasehold houses.

On the 18th of May, 1881, Mr. *Edwards* wrote to Miss *Hughes* as follows:—

"How came you to invest the money when no authority was given by us? I would therefore advise you in future not to do

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anything with any of the trust money without consulting us . . . Is the building insured? Let me know, as my chief object is to know the position in which we are in, as I wish all the business to be transacted in a just and proper manner."

The investment had been found by Mr. *Burden*, and being leasehold was not sanctioned by the terms of the will. The security having proved insufficient, Mrs. *Bahin* and her children brought an action against Miss *Hughes*, Mr. *Edwards*—his wife being dead—and Mr. and Mrs. *Burden*, charging them with a breach of trust and claiming that they should make good the trust fund.

Mr. and Mrs. *Burden* did not appear.

Mr. *Edwards* served a notice on Miss *Hughes* under the third party procedure as follows:—"The Defendant claims to be indemnified by you against the claim for the said trust legacy, interest, and costs, on the ground that you were the acting trustee of the will of the testator *Robert Hughes*, and had assumed to act as the sole trustee thereunder, and that the mortgage of leasehold hereditaments was taken at your instigation and under your advice, and also that you represented to *Frances Mary Edwards*, the wife of the Defendant *E. Edwards*, that the mortgage was a proper and sufficient mortgage for the said trust legacy of £2000, and that the said £2000 was advanced on the faith of that representation."

Mr. Justice *Kay* held *J. Burden* and his wife, Miss *Hughes*, and *E. Edwards* were jointly and severally liable to replace the £2000, and declared that the Defendant *E. Edwards* had no claim to be indemnified by Miss *Hughes*.

From this judgment the Defendant *E. Edwards* appealed.

Vernon R. Smith, for the Appellant:—

A husband is generally liable for his wife's *devastavits* and breaches of trust, but that only applies to those in which she has actively participated, not to losses for which she is only constructively liable through the misconduct or negligence of a co-trustee or co-executor. They signed the receipt only for conformity: *Leigh* v. *Barry* (1); *In re Fryer* (2). But if the Appellant is liable to the *cestuis que trust* he is entitled to an indemnity from

(1) 3 Atk. 583. (2) 3 K. & J. 317.

Miss *Hughes*, the acting trustee. The evidence shews that the mortgage investment was made entirely by Miss *Hughes* with the assistance of *Burden*, neither *Edwards* nor his wife knowing anything of it. They were told by Miss *Hughes* in her letter of the 14th of September, 1880, that when a proper mortgage was found they would be informed of it, and they relied on that assurance. An innocent trustee, although equally responsible to the *cestuis que trust* with a guilty trustee, is not *in pari delicto* as between himself and the co-trustee and is entitled to indemnity from him: *Lockhart* v. *Reilly* (1); *Thompson* v. *Finch* (2); *Earl Powlet* v. *Herbert* (3); *Franco* v. *Franco* (4); *Butler* v. *Butler* (5).

Dauney, for the Plaintiffs.

Dunham, for Miss *Hughes*, was only called on as to the question of indemnity:—

The cases cited do not support the contention of the Appellant. Miss *Hughes* acted with the best intentions, and she was not more to blame than *Edwards*.

Vernon R. Smith, in reply.

COTTON, L.J.:—

This is an appeal by *Edward Edwards*, who married one of the three daughters of the testator, *Robert Hughes*, who were the trustees under the will. The appeal raises two points. The first was this. The Appellant contends that the Plaintiffs, who were the beneficiaries under the will, and were entitled to the sum of £2000 on account of the loss of which this action was brought, have no claim against him under the circumstances of the case. All Mr. *Edwards* alleged he had done in the matter was to leave it in the hands of his wife, and he repudiated the allegation that either he or she were negligent as to the disposition of the trust. The counsel for the Appellant has used the term "*devastavit*," as applying to this case. But *devastavit* is a term which has no application to the law of trustees, but rather to that of executors.

(1) 25 L. J. (Ch.) 697; 27 L. J. (Ch.) 54.
(2) 22 Beav. 316; 8 D. M. & G. 560.
(3) 1 Ves. 297.
(4) 3 Ves. 75.
(5) 7 Ch. D. 116.

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As regards this first question, namely, whether Mr. *Edwards* is answerable for the default of his wife in committing such a breach of trust as this, as much as if she had misspent the money, in my opinion he is altogether answerable. It was an action brought for the loss of the fund, occasioned by a breach of trust, being negligence, on the part of the trustees. We feel no doubt that the *cestui que trust* is entitled to redress as against the trustees, and therefore consider both that the wife of Mr. *Edwards* and himself, as well as Mr. and Mrs. *Burden*, were answerable. The facts are these. The money was invested on a *Mersey Docks and Harbour* bond, but in order to keep up the income it was decided, when the *Mersey Docks Company* reduced their interest, to withdraw the money, and place it on mortgage, and it was especially at the instance of Miss *Hughes* that this was done. Mr. *Edwards* alleges that both Mrs. *Edwards* and himself were unwilling for this to be done; but it was done. The money got into the hands of two of the trustees, and was ultimately mortgaged at the instance of Mr. *Burden* and Miss *Hughes*. Well, beyond question that was a breach of trust, and the *cestuis que trust* had a right to claim for any loss that might be occasioned in consequence of the trustees not having taken care that the money was properly invested, and in my opinion it would be wrong to raise a distinction as regards the liability of Mr. *Edwards*. He is answerable for the same breach of trust, and is not to be differently treated from the other trustees in the matter. The husband is acting and administering on the part and in the right of his wife the duty of trusteeship, who cannot act in the matter without him; therefore he is liable for the breaches of trust committed by her, without drawing any minute distinctions, as might have been done if the case had come within a recent Act, the *Married Women's Property Act*. But that Act does not apply to this case.

But then we come to another and more difficult question, namely, how far Mr. *Edwards* can, as against Miss *Hughes*, have indemnity for the loss, on the ground that she was the acting trustee, that she and Mrs. *Burden* took upon themselves to invest this money, and that although both she and Mr. *Edwards* are liable to the beneficiaries, she is liable to Mr. *Edwards*, who left the matter in her hands. On going into the authorities, there are

very few cases in which one trustee, who has been guilty with a co-trustee of breach of trust and held answerable, has successfully sought indemnity as against his co-trustee. *Lockhart* v. *Reilly* (1) and *Thompson* v. *Finch* (2) are the only cases which appear to be reported. Now in *Lockhart* v. *Reilly*, it appears from the report of the case in the *Law Journal* that the trustee by whom the loss was sustained had been not only trustee, but had been and was a solicitor, and acting as solicitor for himself and his co-trustee, and it was on his advice that *Lockhart* had relied in making the investment which gave rise to the action of the *cestui que trust*. The Lord Chancellor (Lord *Cranworth*) (3) refers to the fact that he was a solicitor, and makes the remark: "The whole thing was trusted to him. He was the solicitor, and, independently of the consideration that one cannot help seeing it was done with a view of favouring his own family, yet, if that had not been so, the co-trustee leaves it with the solicitor-trustee, by whose negligence (I use no harsher word) all this evil, in a great degree, has arisen." Therefore the Lord Chancellor, in giving his decision, relies upon the fact of the trustee being a solicitor. In *Thompson* v. *Finch* a right was conceded to prove against the estate of the deceased trustee for the full loss sustained; but it appears that in this case also he was a solicitor, and that he really took this money to himself, for he mixed it with his own money, and invested it on a mortgage; and therefore it was held that the trustee was entitled to indemnity from the estate of the co-trustee, who was a solicitor. This was affirmed in the Court of Appeal; and the Court of Appeal took so strong a view of the conduct of the solicitor that both of the Judges concurred in thinking that he ought to be called on to shew cause why he should not be struck off the rolls. Of course where one trustee has got the money into his own hands, and made use of it, he will be liable to his co-trustee to give him an indemnity. Now I think it wrong to lay down any limitation of the circumstances under which one trustee would be held liable to the other for indemnity, both having been held liable to the *cestui que trust*; but so far as cases have gone at present, relief has only been granted

(1) 25 L. J. (Ch.) 697. (2) 22 Beav. 316; 8 D. M. & G. 560.
(3) 25 L. J. (Ch.) 702.

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against a trustee who has himself got the benefit of the breach of trust, or between whom and his co-trustees there has existed a relation, which will justify the Court in treating him as solely liable for the breach of trust. Here, when Miss *Hughes* got the money, she handed it over to the mortgagor—as I understand, she handed over to them the actual cheque received from the *Mersey Docks Company*. The Appellant, Mr. *Edwards*, relies on the fact that she sent him a letter with the cheque for him and his wife to indorse, saying that nothing should be done with the money without consulting him; but I think Mr. *Edwards*' own conduct shewed that that was not the view which he took. For she said in that letter that when a suitable mortgage was found and approved of, notice should be sent to the trustees; and undoubtedly on the 2nd of November, after the mortgage was completed, she wrote him with the information that the money had been invested upon leasehold houses. But nothing was done by him with reference to the matter till the 18th of May following, and I can hardly suppose that if he wished for information before the investment was taken that he would have made no inquiry as to what had been done with the money after he had notice that it had been invested. Miss *Hughes* was the active trustee and Mr. *Edwards* did nothing, and in my opinion it would be laying down a wrong rule to hold that where one trustee acts honestly, though erroneously, the other trustee is to be held entitled to indemnity who by doing nothing neglects his duty more than the acting trustee. That Miss *Hughes* made an improper investment is true, but she acted honestly, and intended to do the best she could, and believed that the property was sufficient security for the money, although she made no inquiries about their being leasehold houses. In my opinion the money was lost just as much by the default of Mr. *Edwards* as by the innocent though erroneous action of his co-trustee, Miss *Hughes*. All the trustees were in the wrong, and everyone is equally liable to indemnify the beneficiaries.

BOWEN, L.J.:—

In this case my judgment must be of an uncertain sound and weight. I do not see my way to dissenting formally from the view entertained by my Brethren, who are more familiar with

these matters than I can possibly be; but my difficulty has been in seeing that these parties, Miss *Hughes* and Mr. *Edwards*, were *in pari delicto* as between themselves. As regards the *cestuis que trust*, one stands in a no more favourable position than the other; but I have had some doubt as to whether Miss *Hughes* did not incur an obligation to her co-trustee, Mr. *Edwards*. I have difficulty in seeing that a trustee by allowing his co-trustee to receive a trust fund necessarily sanctions his co-trustee to do what he likes with it. If there had been an express bargain that Miss *Hughes* should not part with the fund without notice to Mr. *Edwards*, it would have been difficult to see that Miss *Hughes* ought not to indemnify Mr. *Edwards* for the breach of that bargain; and it seems to me to be a question of some little difficulty whether, if one trustee allows his co-trustee to receive the trust fund on the faith that he will not part with it without notice, though without any express bargain, it may not be said that the co-trustee comes under an obligation to indemnify him for any violation of that faith, either on an implied legal contract arising from the transaction, or by an equitable obligation arising from the relation between the parties; and the fact that both trustees were equally liable to the *cestuis que trust* would not be sufficient to prevent them from incurring that specific liability to one another. I cannot say that I feel any confidence in my scruples in this matter, nor do I think that there would be any advantage in taking further time to consider my decision, as my learned Brethren entertain a clear opinion on the matter.

FRY, L.J.:—

It appears to me that on the first point arising in this appeal there is no case at all. It appears that in a certain trust the wife of the Defendant Mr. *Edwards* was one of the trustees, and that he has been rendered liable for breaches of trust committed by her, which liability he repudiates by alleging that a husband is is not responsible for all, but only for some, of the breaches of trust which a wife may commit. I rather understand that he draws a distinction between active and passive breaches of trust, but it was admitted by Mr. *Smith* that there is no authority for such distinction, and I can see no principle in law for such a

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distinction. The law of *England*, which has long existed, is that the husband is responsible for the breaches of trust of his wife. Upon the second point I also agree with my Brother Lord Justice *Cotton*. This part of the appeal is based upon some notion that one trustee is liable to indemnify his co-trustee against loss or injury from his acts, but I cannot think that such liability exists, for if it did exist the books would be full of authorities bearing upon the point, and the Courts would be crowded with litigation on the subject. It is well known that the authorities are extremely few, and the authorities which do exist do not favour the Appellant's contention. It has been pointed out by Lord Justice *Cotton* that in each of the two cases cited the trustee who was held to be secondarily liable, and who had a right of indemnity, had been misled by his co-trustee, who was the solicitor to the trust, and had been proved to have been guilty of negligence in his duty as such solicitor. In my judgment the Courts ought to be very jealous of raising any such implied liability as is insisted on, because if such existed it would act as an opiate upon the consciences of the trustees; so that instead of the *cestui que trust* having the benefit of several acting trustees, each trustee would be looking to the other or others for a right of indemnity, and so neglect the performance of his duties. Such a doctrine would be against the policy of the Court in relation to trusts.

In the present case, in my judgment, the loss which has happened is the result of the combination of the action of Miss *Hughes* with the inaction of Mr. *Edwards*. If Miss *Hughes* has made a mistake, it was through simple ignorance and want of knowledge, and if on the other hand Mr. *Edwards* had used all the diligence which he ought to have done, I doubt whether any loss would have been incurred. The money might have been recovered before the property went down in value. I think therefore that it is not possible for Mr. *Edwards* to obtain any relief, and I concur with my Brethren that this appeal must be dismissed with costs.

Solicitors: *Peacock & Goddard*, agents for *Lloyd Griffith, Holyhead; J. J. Chapman; Carter & Bell.*

M. W.

UNITED TELEPHONE COMPANY *v.* DONOHOE.

C. A. 1886 Feb. 6.

[1885 U. 202.]

Practice—Motion for Judgment—Rules of Supreme Court, 1883, *Order* XXXII., *r.* 6—*Patent—Infringement—Admission of Infringement in Defence—Damages—Inquiry.*

Where in an action for infringement of a patent, the Defendant in the defence admitted certain instances of infringement, but denied that he had committed any others, and the Plaintiff thereupon moved for judgment upon the admissions in the pleadings:—

Held, that the Plaintiff was entitled to an inquiry as to damages arising from the admitted infringements only.

ACTION for the infringement of two patents.

The statement of claim alleged that the Defendant had infringed certain letters patent granted to *T. A. Edison* as amended by three several disclaimers, which letters patent had been by indenture assigned to the *Edison Telephone Company*, and afterwards had been by indenture assigned to the Plaintiffs: this patent was thereinafter called the *Edison Patent*.

The statement of claim further alleged that the Defendant had also infringed certain letters patent granted to *W. M. Brown*, as amended by disclaimer which letters patent had been by indenture assigned to the *Telephone Company, Limited*, and had been subsequently by indenture assigned to the Plaintiffs: thi patent was thereinafter called the *Bell Patent*.

The Plaintiffs claimed an injunction against the infringement of their letters patent, and also an account or damages and costs as between solicitor and client.

The particulars of breaches delivered with the statement of claim alleged that the Defendant had manufactured, purchased, sold, supplied, let on hire, and used certain carbon telephone transmitters, and also telephone transmitters and receivers known as magneto-telephones; and that the carbon transmitters and magneto-telephones manufactured, purchased, sold, supplied, let on hire, and used by the Defendant, were respectively constructed substantially for the purpose and in the manner described and claimed in the specifications of the *Edison Patent* and the *Bell Patent* as amended by disclaimer.

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Statement of defence:—

1. The Defendant admits the validity of the Plaintiffs' said patents.

2. The Defendant before or in the year 1881 sold two telephones to *Herbert Trott*, of the firm of Messrs. *G. & H. Trott*, of *Battersea*, who was a friend of the said Defendant. Such telephones were purchased by the Defendant in the open market in the year 1880, when telephones were commonly sold in the open market. The said Defendant also sold before or in the year 1881 eight telephones to one *R. Coveney*, then of *Canterbury, Kent*, who was also a friend of the said Defendant.

3. Save as aforesaid, the Defendant denies that he has infringed the Plaintiffs' patents, or any of them.

4. The Defendant wrote to the Plaintiffs in the month of July, 1884, eight months before the commencement of this action, undertaking not to infringe the Plaintiffs' patents. He has always complied, and is willing to comply, with such undertaking.

5. The Defendant has no infringing instruments in his possession or power. The Defendant is not a manufacturer, trader, or dealer in telephones, or telephonic instruments.

6. The Defendant submits that the Plaintiffs' action is unnecessary and oppressive, and ought to be dismissed with costs.

The Plaintiffs having moved for judgment upon the admissions contained in the statement of defence, Vice-Chancellor *Bacon* granted a perpetual injunction against the infringement by the Defendant of the Plaintiffs' letters patent with costs; but he refused an inquiry as to the damages.

By way of appeal the Plaintiffs gave notice of motion that the judgment might be varied by adding a direction for an inquiry as to the damages sustained by the Plaintiffs by reason of the Defendant's infringements in the pleadings mentioned, and that the Defendant might be ordered to pay to the Plaintiffs the amount of such damages.

Moulton, Q.C., for the Plaintiffs, in support of the appeal:—

The Plaintiffs do not accept the allegation of the Defendant, that he has committed infringements of the Plaintiffs' patents only in ten instances; they are entitled to an inquiry for the

purpose of ascertaining whether he has committed any other infringements. The practice upon a motion for judgment is the same as that upon the trial of an action, where upon proof of the infringement of the plaintiff's patent, he is entitled to a general inquiry as to damages.

The Defendant in person.

LORD ESHER, M.R.:—

In this case the Plaintiffs have moved for judgment upon the pleadings instead of joining issue and setting down the action for trial: they have, therefore, accepted the statement of defence, and must take the negative as well as the affirmative allegations therein contained: they cannot now dispute that there have been only ten instances in which the Defendant has infringed the Plaintiffs' patents. They are entitled to an inquiry as to these ten instances of infringement, but as to no others. At the inquiry, all evidence as to any other instances of infringement alleged to have been committed by the Defendant must be excluded.

LINDLEY, L.J.:—

This is a judgment obtained under Rules of the Supreme Court, 1883, Order XXXII., rule 6. The Plaintiffs having obtained judgment in this manner must stand or fall by the admissions contained in the pleadings: they must stand or fall by the ten instances of infringement. The Plaintiffs are entitled to an inquiry as to the instances of infringement admitted in the pleadings, and to no others.

LOPES, L.J.:—

I am clearly of opinion that the Plaintiffs are entitled to an inquiry as to the instances of infringement admitted in the pleadings, but as to no others.

LORD ESHER, M.R.:—

As the Plaintiffs have partly succeeded and partly failed, there will be no costs of this appeal.

Solicitors for Plaintiffs: *Waterhouse, Winterbotham, & Harrison.*

J. E. H.

C. A.
1886
Jan. 22.

REID *v.* REID.

[1883 R. 1795.]

Married Women's Property Act, 1882 (45 & 46 *Vict.* c. 75), *s.* 5—*Reversionary Interest of Woman married before the Act—Accruer of Title—Property coming into Possession after the Act.*

Property to which at the time of the commencement of the *Married Women's Property Act*, 1882, a woman married before the Act was entitled subject to a life estate, but not for her separate use, *held* not to become her separate estate by falling into possession after the commencement of the Act.

If a woman married before the commencement of the *Married Women's Property Act*, 1882, has before the commencement of the Act acquired a title, whether vested or contingent, and whether in reversion or remainder, to any property, such property is not made her separate estate by sect. 5 (1) of the Act, though it falls into possession after the Act.

Baynton v. *Collins* (2) overruled.

By an indenture dated the 21st of December, 1874, real estate was conveyed to trustees upon trust to sell, with the consent of *Eliza Rodhouse*, widow, during her life, and after her death at their own discretion. By the same deed personal estate was assigned to the same trustees upon trust to raise £1000 and pay it to the Plaintiff, Mrs. *Reid*, a daughter of Mrs. *Rodhouse*. The trustees were to invest the proceeds of the real estate, and the residue of the personal estate, and pay the income to Mrs. *Rodhouse* for life, and on her decease to pay £1000 each to the Plaintiff's brother and sister, and to hold the residue in trust for the Plaintiff and her brother and sister in equal shares. The £1000 provided by this deed for the Plaintiff was received by her husband, whom she had married in 1871.

Mrs. *Rodhouse* died in February, 1883, and in August, Mrs. *Reid*, by her next friend, commenced this action, asking for a

(1) Sect. 5: "Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid."

(2) 27 Ch. D. 604.

declaration that under the *Married Women's Property Act*, 1882, she was entitled for her separate use to her share and interest under the deed of 1874, or, in the alternative, that the whole of such share might be settled on her and her children.

The husband in June, 1883, mortgaged his wife's share.

The action came on for trial before Mr. Justice *North*, who, considering the law to be settled by *Baynton* v. *Collins* (1), *In re Thompson and Curzon* (2), and *In re Hughes' Trusts* (3), without expressing any opinion of his own on the construction of the *Married Women's Property Act*, gave a judgment declaring that the Plaintiff was entitled to her share and interest for her separate use. The incumbrancers were to add their costs to their security. The husband was ordered to pay the Plaintiff's costs to the next friend, and the trustees were directed to retain their costs out of the Plaintiff's share and pay the residue of the share to the Plaintiff, but if an appeal was lodged within fourteen days this payment was to be suspended till the appeal was disposed of. The husband appealed.

W. Willis, Q.C., and *Daniel Jones*, for the appeal:—

The question turns on the words in sect. 5 of the *Married Women's Property Act*, 1882: "her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act." The words "whether vested &c." appear to be unnecessary, but were reasonably introduced to preclude the question whether the enactment was confined to property coming into possession after the passing of the Act. In construing the language we must bear in mind the rule that an Act is not, unless it is unavoidable, to be construed so as to take away existing rights. Here *Reid* at the time of the passing of the Act had a substantial interest in this property, which, apart from the Act, nothing that his wife could do would take away, and which he could sell for value. If it fell into possession during the coverture he could claim it subject to her equity to a settlement, and if the wife died before it came into possession, and he survived her, he would be absolutely

(1) 27 Ch. D. 604. (2) 29 Ch. D. 177.
(3) W. N. 1885, p. 62.

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entitled to it. According to *Baynton* v. *Collins* (1) the Act confiscates the husband's rights. The first decision on this question is *Baynton* v. *Collins*, before Mr. Justice *Chitty*, which is against us, but as it was *ex parte* it is of little weight. It was, however, followed in *In re Thompson and Curzon* (2), by Mr. Justice *Kay*, without his expressing any opinion of his own, and Mr. Justice *Pearson* followed it in *In re Hughes' Trusts* (3) in a case where there was no conflict between the husband and wife. After this, in *In re Tucker* (4), where a real conflict of interest arose, Mr. Justice *Pearson*, after argument, decided in opposition to *Baynton* v. *Collins*, and Mr. Justice *Kay* took the same view in *In re Adames' Trusts* (5). Lastly, in *In re Hobson* (6), Mr. Justice *Chitty* followed the two last-mentioned cases, though with an intimation that he was not satisfied that his decision in *Baynton* v. *Collins* was wrong. His Lordship there speaks of the rights of a husband in his wife's reversionary fund as inchoate and shadowy, but they are of a very substantial character, and the Legislature will not be considered to have taken them away by *ex post facto* legislation unless the intention to do so is clear. The married woman's title accrues when she first acquires an interest, vested or contingent, and whether in possession, reversion, remainder, or expectancy, and it does not accrue at several times. The words relied on in *Baynton* v. *Collins* come substantially to this, "whatever the nature of that title may be."

F. Thompson, for the husband's incumbrancers.

Swinfen Eady, for the trustees.

Barber, Q.C., and *F. H. Colt*, for the wife:—

In *In re Dixon* (7) Vice-Chancellor *Bacon* followed and approved of *Baynton* v. *Collins*. We admit that the burden is on us to shew that the Act is retrospective, but to some extent it clearly is so, and the only question is how far? Suppose a man before

(1) 27 Ch. D. 604.
(2) 29 Ch. D. 177.
(3) W. N. 1885, p. 62.
(4) 33 W. R. 932; 52 L. T. (N.S.) 23; 54 L. J. (Ch.) 874.
(5) 33 W. R. 834; 53 L. T. (N.S.) 198; 54 L. J. (Ch.) 878.
(6) 34 W. R. 195.
(7) 54 L. J. (Ch.) 964.

the Act marries without a settlement a woman of "good expectations," he loses by the Act the chance of getting for himself the money which may come to her, which, according to the other side, is "confiscation." *Weldon* v. *Winslow* (1) supports the view that the Act may be treated as retrospective to this extent. [*In re March* (2) was also referred to]. The words "her title to which shall accrue," come to the same thing as "to which she shall become entitled," which are the words in the *Married Women's Property Act*, 1870 (33 & 34 Vict. c. 93), s. 7, and have been held to include property to which the married woman had a reversionary title before the marriage, but which fell into possession afterwards: *Lane* v. *Oakes* (3).

[COTTON, L.J.:—The language of that Act is different. It is to be observed that here the words are not "her title to which shall accrue in possession, &c."—but "her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue." The qualification is attached to "title," not to "accrue."]

A change of title will satisfy the words of the Act, as is shewn by the analogy of the cases as to covenants to settle a wife's future property: *Maclurcan* v. *Lane* (4), which turned on the word "accrue," and is therefore closely in point: *Archer* v. *Kelly* (5); *In re Clinton's Trust* (6).

COTTON, L.J.:—

This is a case which comes before us after a most singular variety of judicial opinions on the construction of the 5th section of the *Married Women's Property Act*, 1882. The question for our consideration is, what is the true meaning of the language which the Legislature has employed? Cases on the construction of other Acts or instruments generally give very little help to the Court, but if there is any principle laid down by them we ought not to disregard them in considering a different Act or instrument. Here, however, the authorities to which we have been referred, except those in which the learned Judges differed on

(1) 13 Q. B. D. 784.
(2) 27 Ch. D. 166.
(3) 22 W. R. 709.
(4) 5 Jur. (N.S.) 56.
(5) 1 Dr. & Sm. 300.
(6) Law Rep. 13 Eq. 295.

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the construction of this section, relate only to the construction of covenants in marriage settlements. Now, as Vice-Chancellor *Wickens* said in *In re Clinton's Trust* (1), cases of that class must be approached with the presumption that the object and intention of the settlement is to prevent the husband acquiring property of the wife which falls into possession during the coverture. But sect. 5 has not the same object, for although undoubtedly the Act does interfere, and is intended to interfere, with the rights acquired by the husband by marriage, and, with regard to husbands married after the Act, entirely takes away all marital right to the wife's property and makes it her separate estate, the 5th section, which applies to persons married before the Act, is limited to property the title to which accrues after the Act, and there is no presumption that it is not intended to be confined to property in which the husband at the commencement of the Act had not any interest. The cases on marriage settlements give us no assistance when we look at the language used in the covenants. In *In re Clinton's Trust* the words were, "become entitled." The principle laid down is that these words are satisfied if there is some change of some sort or other in the title, but the actual decision does not help us at all, for Vice-Chancellor *Wickens* held, on the construction of the covenant, that the words "become entitled" must mean "become entitled in possession," and not otherwise. Nor does the case of *Maclurcan* v. *Lane* (2), before Vice-Chancellor *Stuart*, in any way help us, because the language of the covenant in that case was materially different from what we find in the section before us, the covenant there speaking of an accruer of property, not an accruer of title.

We must look, then, at the 5th section and see what its true construction is. I do not think that we get much assistance from the previous Act of 1870. The language differs, and it is to be presumed therefore that the object of the Legislature was to some extent different. [His Lordship then read the 5th section.] The section does not say "all real and personal property which shall accrue to her after &c.," but "all real and personal property her title to which shall accrue after &c." Now, it is

(1) Law Rep. 13 Eq. 295, 305. (2) 5 Jur. (N.S.) 56.

said by the Respondent that there may be five kinds of accruer of title, the accruer of a title vested, contingent, in possession, reversion, or remainder, and that if any one of those kinds of accruer happens after the Act came into force, then that this section applies and the woman holds the property for her separate use. That, to my mind, alters the words of the section. The words are not "her title to which shall accrue either as vested, or contingent, or in possession, reversion, or remainder," but the section describes by the words which intervene between "the title to which," and, "shall accrue," all the different forms of the title the accruer of which after the commencement of the Act brings the property within this section. That is, in my opinion, the fair and true construction of this enactment. In considering what is the true construction of an Act, I am not so much affected as some Judges are by the consequences which may arise from different constructions. Of course, if words are ambiguous, and one construction leads to enormous inconvenience, and another construction does not, the one which leads to least inconvenience is to be preferred, and I should say here that the construction which has been adopted by Mr. Justice *Pearson* gives rise to the least inconvenience. There is a title accruing in reversion before the passing of the Act. The husband acquires a title to it, subject to his wife's equity to a settlement if it falls into possession during the coverture, and subject to her right by survivorship if he dies before it has been reduced into possession leaving her surviving. He might before the passing of this Act have disposed of it by mortgage or sale subject to the wife's equity to a settlement and to her chance of survivorship. If the construction contended for here by the Respondent is correct, the title of the person claiming under the husband would be ousted, and the wife, notwithstanding the dealing with the property by the husband, would take it as her separate estate when it fell into possession. In the present case, it is true that the mortgagees took their mortgage after the commencement of the Act, so that this construction would not deprive them of a right which they had when the Act passed, but I am not considering merely the rights of the parties now before us, I am looking at what may be the general effect of one construction or

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the other. In my opinion, considering the section truly and fairly, there must be an accruer of title after and not before the passing of the Act, and the title must be considered as accruing when the married woman first acquires her interest in the property, whether such interest is at that time in possession, reversion, or remainder. I think that the words "whether vested or contingent, and whether in possession, reversion, or remainder," were introduced simply to prevent any question arising as to whether if a married woman after the passing of the Act acquired a contingent or reversionary interest the Court could hold that the Legislature intended to enable her to deal with it as her separate estate while still contingent or reversionary.

In my opinion the appeal must succeed, and as the question of what the wife is entitled to under her equity to a settlement has not been dealt with, that question had better be sent back to the Judge to whose Court the cause is attached. We therefore dismiss with costs so much of the action as seeks to claim on behalf of the married woman this property as her separate estate. The remainder will be remitted to the Court below.

BOWEN, L.J.:—

I am of the same opinion. Assuming that the words of the section are ambiguous, and capable of two constructions, what is the principle of construction which we ought to apply? We are dealing, it is true, with an Act which is in some sense and to some extent retrospective, and with a section that is to some degree retrospective. The section applies to and affects marriages contracted before the commencement of the Act, and alters with respect to such marriages, in the manner indicated by the section, the consequences of the marital relation. Now the particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim *omnis nova constitutio futuris formam imponere debet non præteritis*, that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section

which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant.

Now as to sect. 5, it applies in express terms to marriages contracted before the commencement of the Act. Then are we to take the view which Mr. *Barber* puts forward, or are we to deal with this section as having the narrow operation for which the Appellant contends. Let us assume that a deed made before the Act gives a married woman a reversionary interest which will, on the happening of some event or another, ripen into a right in possession. Mr. *Barber* says the section was intended in such a case, where the subsequent event in which the right was to mature into possession happens after the Act was passed, to affect the possessory interest when it arises, although the Act of Parliament did not touch the reversionary interest while it continued reversionary. To make such a distinction as that seems to me to be not very intelligible or conformable to common sense and reason. Moreover this construction may displace or disturb previous dispositions of property, and therefore unless we can read in plain language that the Legislature intended what Mr. *Barber* contends for, the principle of construction with which I set out forbids us to adopt that construction. On coming to the words of the section it appears to me that not only is their meaning not clearly such as Mr. *Barber* contends for, but that the words point in the opposite direction. The words are, "her title to which" (I omit the intermediate words as to the several kinds of title) "shall accrue." I cannot help thinking that those words plainly indicate that the section uses the term "her title" in a sense which involves the assumption that there will be only one title and one accruer of title once for all. If so, "her title" must mean her original title at the time when the right first accrued to her under the instrument which creates the title. But to read the words "her title" as equivalent to the words "her title for the time being," and to attribute the term separately to each phase which that original title assumes, really involves the proposition

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that there may be several periods of accruer of title in respect of the same property arising out of the same original right. I think the words which have been added, "whether vested or contingent, and whether in possession, reversion, or remainder," are words which refer to the character of the title, and are intended to shew that a title of every character was to be included, not merely a possessory title, and have nothing to do with, and do not throw any light upon, the time at which the title is to accrue. I think, therefore, that the judgment of Mr. Justice *Pearson* is the correct judgment on this section, and that the earlier view of Mr. Justice *Chitty* cannot be sustained.

FRY, L.J.:—

I also am of the same opinion. Several arguments have been addressed to us to induce us to put a particular construction on this section. In the first place we have been told that a series of decisions on this section has gone far to establish the rights under it: but looking at the conflict which has taken place in the Courts of first instance, it appears to me impossible to say that there is any course of decisions which can in any way bind, or which ought seriously to influence this Court, although of course we shall always look with the greatest possible respect on the reasons for which the Judges of first instance have come to their conclusions. Then we have been invited to compare this section with the section of the earlier Act, the Act of 1870, and to say that the words of this section have a larger meaning than the words in the corresponding section of the other Act, the words in the two sections being different. It is obvious that we can only tell whether they have the same, or a larger, or a narrower meaning when we have construed the words of this section, and therefore that argument really does not assist us in construing this section itself. Then, lastly, we have been invited to found our decision upon the cases as to covenants to settle after-acquired property. I content myself with saying that they appear to me to have nothing whatever to do with the decision of the present case. Therefore I think we are bound to look simply at the words of the 5th section of the Act of 1882, and to determine what is their true and natural meaning, having regard to the existing law at the time when that statute was passed.

Now the section deals with real and personal property, a married woman's title to which shall accrue after the commencement of this Act. It appears to me that the section deals with one title and with one title only. It is quite true that words are introduced by way of parenthesis, which refer to five kinds of title, vested, contingent, in possession, in reversion, or in remainder, and it was suggested that the true meaning of the words "her title" is any one of the five following titles which shall accrue to her after the commencement of the Act. I do not think that is the true construction; I think the section deals with one title, and with one title only, and I think it means the title which first accrues to the wife. I think therefore that the words must be construed as meaning property her first accruing title to which, whether such title be vested, contingent, in possession, in remainder, or in reversion, shall accrue after the commencement of this Act. That appears to me to be the natural construction of the enactment. It appears to me further, that the words which I have treated as parenthetical were introduced to preclude an argument which might otherwise have been raised as to the nature of the title which was so to first accrue. It might have been contended, if those words had not been introduced, that the accruer of the title in reversion or contingency was not an accruer of title within the meaning of the Act. I think the object of these words is to make it clear that all property in which the married woman first acquires a title after the commencement of the Act, comes within the operation of this section, whatever the nature of that title may be. Taking that view, I agree in what has been said as to the proper mode of dealing with this action. I think the action should be dismissed with costs so far as it claims a declaration under the *Married Women's Property Act*, 1882, leaving the question of an equity to a settlement to be dealt with by the learned Judge on a future occasion.

Solicitors for Plaintiff: *Pattison, Wigg, & Co.*
Solicitors for Appellant: *Gedge, Kirby, & Millett.*
Solicitors for Trustees: *Indermaur & Brown.*
Solicitors for Incumbrancers: *Robins, Cameron, & Kemm.*

H. C. J.

V.-C. B.
1886
Jan. 15.

TRUSTEES OF ST. SAVIOUR'S RECTORY AND OYLER.

[1885 S. 3288.]

Vendor and Purchaser—Disused Burial Ground—Sale—Building Land—Sale "under the authority of any Act of Parliament"—St. Saviour's, Southwark (Church Rate Abolition) Act, 1883 (46 & 47 *Vict. c. xi.*), *ss.* 6, 7, 9—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *ss.* 3, 5—*Conditions of Sale—Sufficiency of Explanation.*

By the *St. Saviour's, Southwark (Church Rate Abolition) Act*, 1883, after reciting that certain land was then vested in trustees upon trust to apply the income for the purposes therein mentioned, the land was (sects. 6 and 7) vested in the trustees appointed by the Act upon trust to apply the income for purposes corresponding to those of the original trust; and by sect. 9 the trustees were empowered to sell the land or let it on building or other leases. The land had formerly been used as a burial ground, but in 1853 it was closed as such by an Order in Council, and thus became a "disused burial ground."

By sect. 3 of the *Disused Burial Grounds Act*, 1884, building on any disused burial ground is prohibited, but sect. 5 enacts that nothing in the Act contained "shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament."

In 1885 the trustees under the Act of 1883 put the land up for sale by auction, describing it in the particulars as "building land," and stating in the conditions that although it was a disused burial ground they believed that it came within sect. 5 of the Act of 1884, and that they had therefore power under the Act of 1883 to sell it as building ground. The property was knocked down to Messrs. *O.*, who signed the contract and paid the deposit.

The purchasers, who bought for building purposes, having refused to complete on the ground that building on the land was expressly prohibited by the Act of 1884:—

Held, on a summons by the trustees under the *Vendor and Purchaser Act*, 1874, that the Act of 1883 did not constitute a sale or disposition "under the authority of any Act of Parliament," and that, having regard to the Act of 1884, the contract could not be enforced against the purchasers.

Adjourned summons.

On the 21st of May, 1885, the trustees of *St. Saviour's Rectory, Southwark*, put up for sale by auction a piece of land fronting *Union Street* and *Red Cross Street, Borough*, subject to certain particulars and conditions of sale. The particulars, after describing the property as "freehold building land," stated that it had been

formerly occupied by a builder and contractor, "and is believed to have been formerly an unconsecrated burial ground. It is especially suited for its former use as premises for a builder and contractor, or for a timber-yard, and offers sites for stabling and other business premises, and is adapted for many other purposes; . . . . the sale of the adjoining freehold estate, the property of the trustees of the Misses *Jones*, deceased, ... on the same day, and immediately preceding this sale, offers to speculators an opportunity for the acquisition of both properties and their development into one."

The 7th condition of sale stipulated that the title should commence with the *St. Saviour's, Southwark (Church Rate Abolition) Act*, 1883, "whereby the property mentioned in the particulars, which is now, and has been for many years past, a disused burial ground, and which is, together with other property not comprised in the particulars or included in this sale, in the said Act described as" (then followed the description), "was vested in the rectory trustees, the present vendors, with power to sell and grant leases as therein mentioned."

Condition 8 was as follows:—"Notwithstanding section 3 of the *Disused Burial Grounds Act*, 1884, which renders it unlawful to erect any building upon any disused burial ground except for certain purposes, the vendors believe that they are entitled to sell the property comprised in the particulars as building ground, as by sect. 5 of the same Act nothing therein contained 'shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament.'"

At the sale the property was knocked down for £2300 to Messrs. *Oyler*, who thereupon signed the contract and paid the deposit. The purchasers, who had bought the land for building purposes, afterwards refused to complete on the ground that sect. 3 of the *Disused Burial Grounds Act*, 1884, expressly prohibited the erection of any buildings on "a disused burial ground," except for purposes not material to the present case.

The trustees then took out this summons under the *Vendor and Purchaser Act*, 1874, asking for a declaration that the purchasers were precluded by the conditions of sale from making the objection, and that a good title had been shewn.

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The land had been closed as a burial ground by an Order in Council in 1853, and was admitted to be, in fact, "a disused burial ground."

By the *St. Saviour's, Southwark* (*Church Rate Abolition*) *Act*, 1883, after reciting that under letters patent granted by King *James* I., and a conveyance dated in 1614, the rectory and parish church of *St. Saviour, Southwark*, and the burying ground of the parish church, were vested in trustees upon trust that the income should be employed by the churchwardens in maintaining two chaplains (subsequently reduced to one), a schoolmaster and usher, and in maintaining the parish church, and for other necessary expenses connected therewith: and also reciting an Act of King *George* III., authorizing a church rate to be levied for, among other purposes, the repairs of the church: and also reciting that the piece of ground now in question, being the hereditaments described in the first schedule to the present Act, had been vested by a conveyance of 1863 in the wardens of the parish church in fee simple; that the income thereof was applicable to the repairs and maintenance of the parish church; and that it was expedient that the said hereditaments should be vested in the trustees constituted by the present Act; and also reciting that a scheme for the application by the wardens of the parish church of the income of the property by the Act vested in the trustees in defraying the expenses then defrayed out of the church rate, and for the abolition of the rate, and for other purposes, had been approved of: It was enacted (sect. 1), that the right to levy the church rate should cease: (sect. 6), that the existing trustees of the rectory and other premises, together with the rector for the time being of the parish church, should be trustees of the rectory and premises, and that all property, real and personal, then vested in the existing trustees should be vested in the trustees as constituted by that section, thereinafter referred to as "the trustees:" and (sect. 7) that certain sums of cash and stock should vest in the trustees, and that the hereditaments and premises described in the first schedule, "and all the estate and interest of the wardens therein, shall on and after the passing of this Act be, by virtue of this Act, without any conveyance absolutely vested in the trustees," the income of the property so

vested in the trustees to be paid over to the wardens to be applied by them in payment of certain stipends to the rector and schoolmaster of *St. Saviour's*, and towards defraying the expenses of repair and maintenance of the parish church and other expenses connected with the church.

By sect. 9 the trustees were empowered to sell, either by public auction or private contract, or to let on building or other leases, the whole or any part of the hereditaments vested in them by the Act.

In support of the summons affidavits were read to the effect that at the sale, before any biddings were made, the auctioneer announced that the property was a disused burial ground, to which certain disabilities were attached, and that the human remains could not be removed without an order from the Secretary of State; but Mr. *T. P. Oyler*, the purchaser who attended the sale, deposed, on the contrary, that no such announcement was made in his presence; that his only object in bidding for the property was to build lodging-houses thereon; that he made his bids solely in reliance upon the particulars and conditions of sale; and that had he known that the land was not building land as described, and that certain disabilities were attached to it, he would not have made any bid for it (1).

Fischer, Q.C, and *Sharood*, for the summons:—

The purchasers' objection is precluded by the conditions: they are bound to accept the title shewn by the *St. Saviour's, Southwark* (*Church Rate Abolition*) *Act*, 1883, and to assume that the power to sell and grant leases referred to in condition 7 is a valid and subsisting power. All the circumstances are fully stated in the particulars and conditions, and nothing has been concealed. It is, moreover, clear that this land comes within the exception

(1) The material sections of the *Disused Burial Grounds Act*, 1884, which received the royal assent on the 14th of August, 1884, are as follows:—

"3. After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship."

"5. Nothing in this Act contained shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament."

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in sect. 5 of the *Disused Burial Grounds Act*, 1884, as, by virtue of the *St. Saviour's Church Rate Abolition Act*, 1883, the land has been "sold or disposed of under the authority of an Act of Parliament."

Marten, Q.C., and *F. H. Colt*, for the Purchasers:—

The objection is not precluded by the conditions. The vendors cannot invite purchasers to buy as building land that which they know cannot be used for that purpose. There has been no sale "under the authority of an Act of Parliament," for the disposition of the property made by the Act of 1883 does not constitute a sale "under the authority of an Act of Parliament." That Act simply effected the transfer for parochial purposes of charitable land from one set of trustees to another; whereas the exception in sect. 5 of the Act of 1884 is intended only to apply to sales or other dispositions for valuable consideration. The trusts constituted by the Act of 1883 are substantially the same as those which previously existed. Besides, the Act of 1883 constituted a disposition "by" and not "under the authority of" an Act of Parliament, and is therefore not a disposition authorized by the *Disused Burial Grounds Act*. The vendors are not entitled to insert an elaborate condition to prevent purchasers from doing that which the particulars and conditions expressly invite them to do.

Fischer, in reply.

BACON, V.C.:—

This summons raises a nice question of conflict between two Acts of Parliament; and as I am satisfied that there were nothing but honest intentions on the part of the vendors—no misdescription, and no attempt to mislead, it would appear to be hard upon the vendors that such an objection as is here taken should prevail; but if the objection is founded upon positive law, what right have I to disallow it?

This piece of land is described as "building land." No doubt, as regards its position, it is very suitable for building land, if, by law, buildings can be erected upon it. There is no

imputation upon the vendors for having described it as building land, particularly as their explanation contained in the particulars is very distinct; they say it was occupied by a builder and contractor for the deposit of his materials and is very suitable for a like purpose for the future. I think the particulars were drawn in perfectly good faith: but if it was the intention of the vendors to bind the purchaser to take upon himself the burden of having the question which has been raised decided, then I say the conditions are not sufficiently explicit. The vendors say, "Our title began with the Act of 1883, in which the land we are going to sell is described in the schedule; and by that Act of Parliament that land was vested in us, the present trustees, with power to sell and grant building leases as therein mentioned." Then another condition, which ought to be read as following the previous condition without any break, says, "Notwithstanding sect. 3 of the *Disused Burial Grounds Act*," which is a prohibitory section, "the vendors believe that they are entitled to sell the property comprised in the particulars as building ground, as by sect. 5 of the same Act nothing therein contained 'shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament.'"

The question, therefore, has to be decided solely, so far as I can see, upon the Act of 1883. The vendors were not to blame in anything they have done, excepting so far as it may be said they are to be blamed for not having expressly told the purchasers that the legal question has never yet been decided. A condition stating that "the question may be raised, and if it is decided against you, you take the burthen of that: we guarantee nothing," would have been binding on the purchaser; but this is not really a condition at all, but only a statement of fact. The vendors believe they can make a good title according to the particulars and conditions, although the 3rd section of the *Disused Burial Grounds Act* says there shall be no building; and they insist upon that because they say the Act of 1883 did "dispose of" the land.

Now, the Act of 1883, abolishing the church rate and making a new disposition of the property, does, in the plainest terms, vest in the trustees, the present vendors, the property in question,

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and declares that all the estate and interest of the wardens therein shall "be, by virtue of this Act, without any conveyance absolutely vested in the trustees." Nothing can be more clear and distinct.

But then it becomes necessary to consider what it is that is vested in the trustees. Now for general purposes—for universal purposes I may say—the existence of burial grounds in certain places has been found to be injurious to the public health or the public convenience. By Orders in Council such burial grounds were closed. Then comes this Act of 1884, which is a general Act, but which, in most express terms, describes "a disused burial ground," saying it "shall mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein." Nothing can be more plain than that definition. Nothing can be more plain than the prohibitory section: "After the passing of this Act it shall not be lawful to erect any building upon any disused burial ground except for the purpose of enlarging a church." What was the position of the trustees, the present vendors, at that time? Under the Act of 1883 it is said they have power to sell. I do not dispute that they had, but it is a power they did not exercise. The Act of 1884 does not give any title to a disused burial ground; all it does is to prohibit any buildings being erected on it, no matter whose it may be or what powers may exist over it. By the Act of 1883 the trustees had a right to sell this land; but after the Act of 1884 was passed neither the trustees nor anybody else could use it for any other purpose than that to which it had been dedicated, that is, as waste land.

Then it is said that the Act of 1883, which did vest in the trustees an absolute fee simple in this land, was a sale or disposition "under the authority of an Act of Parliament." I do not think so. By the Act of 1883 no change was effected in the land. The trustees were empowered to sell or to grant building leases. If they had exercised either of those powers before the Act of 1884 was passed, that would have been lawful on their part. As they chose to retain a disused burial ground until, on the 14th of August, 1884, the day the Act received the royal assent, the law declared that there should be no buildings upon

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any disused burial ground, except for the purposes mentioned, I think it was unlawful for the trustees thereafter either to build upon it themselves or to sell it as building land as they proposed to do in this instance. I think their power to do so was taken away by the Act of 1884. This is a binding and valid Act of Parliament, and the simple question is, whether I am to force upon these purchasers the payment of money which they have contracted to pay in the face of an Act of Parliament which says that no building shall be erected upon this land, it having been closed as a burial ground by an Order in Council. I think it is to be regretted that the trustees took the view they did, and that they did not explain a little more fully that there had been an Order in Council under which this land has become a disused burial ground, instead of simply saying, "We believe that under a certain Act of Parliament we have a right to sell."

In the face of the subsequent Act of 1884, I cannot hold that the Act of 1883 enabled the trustees to do that which prior to the Act of 1884 it did authorize them to do—either to sell or grant leases for building purposes.

I must declare, therefore, that the contract is not enforceable against these purchasers.

Solicitors: *Nye, Greenwood, & Moreton; A. Turner & Son.*

G. I. F. C.

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Jan. 30.

In re CROOKE'S MINING AND SMELTING COMPANY.

GILMAN'S CASE.

Company—Winding-up—Contributory—"Member"—Subscribing Memorandum—Application for additional Shares—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 23 [*Revised Ed. Statutes, vol. xiv., p.* 207].

On the formation of a limited company *G.*, a director, subscribed the memorandum of association for fifty shares as his qualification. Shortly afterwards he expressed his intention of taking fifty more shares, and thereupon, in order to satisfy the requirements of the *Stock Exchange* prior to settlement and quotation, signed a formal letter of application for 100 shares, it being, as alleged, intended by him and also understood by his co-directors that these 100 shares included the fifty for which he had subscribed the memorandum. 100 shares were then duly allotted to him; they were registered in his name, and he fully paid them up.

The company having afterwards been ordered to be wound up, an application by the liquidator under sect. 23 of the *Companies Act*, 1862, to fix *G.* as a contributory in respect of the fifty shares for which he had subscribed the memorandum, was dismissed with costs.

THIS was an application to fix *Ellis Gilman* on the list of contributories of *Crooke's Mining and Smelting Company, Limited.*

The company was incorporated in 1882 with a capital of £301,000 in £5 shares.

The memorandum and articles were dated the 31st of March, 1882, and the company was registered on the 14th of April, 1882. *Gilman* was one of the seven original subscribers of the memorandum and articles. He was also one of the original directors named in the articles. The qualification for a director was the holding not less than fifty paid-up shares. Among the seven signatories of the memorandum were several other directors, who also signed for fifty shares each.

On the 24th of April, 1882, *Gilman* and other directors signed applications for 100 shares each. *Gilman's* application was in the common form. Two of the others had a note appended that the 100 shares applied for were to include the fifty specified in the memorandum. All these shares were allotted on the 28th of April, 1882, and *Gilman* and others were entered in the register and treated as the holders of 100 shares each, and *Gilman* had paid his 100 shares up in full.

The company was ordered to be wound up on the 1st of August, 1885, and the liquidator put down *Gilman* as a contributory for fifty shares pursuant to the memorandum, and the Chief Clerk having declined to settle him on the list, the matter was adjourned into Court.

Gilman's statement, supported by the secretary, was as follows:—

He had signed the memorandum for fifty shares as his qualification.

Subsequently he, together with other directors who had also signed the memorandum, was urged to take shares in addition to his qualification, whereupon he consented to take fifty more shares, making, with those for which he had signed the memorandum, 100 shares.

At the same time he was informed, and he was so advised by the solicitor to the company, that it was necessary, in respect of all the shares he had agreed to take, that he should sign the usual form of letter of application to the company for them, as the committee of the *Stock Exchange* required, on being applied to for a settlement and quotation, the production of letters of application for all shares allotted, including those for which the memorandum had been signed. Accordingly, on the 24th of April, 1882, *Gilman* signed and sent a formal letter of application for 100 shares, it being, as he deposed, intended by him and "understood" at the time by the directors and other officers of the company, that the 100 shares included the fifty for which he had signed the memorandum.

Other subscribers to the memorandum also took further shares and signed similar letters of application, but took the precaution of adding a note to the effect that the shares thus formally applied for included the shares for which they had signed the memorandum, and the shares were then allotted on the 28th of April, 1882.

Hemming, Q.C., and *Phipson Beale*, for the liquidator:—

Gilman by subscribing the memorandum for fifty shares made himself a shareholder for that amount. That the contract to take those shares was complete the moment he subscribed for them is clear from the terms of sect. 23 of the *Companies Act*, 1862,

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which says that, "The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members."

But the case is covered by authority. In *Evans's Case* (1), *Evans*, who was a director, subscribed the memorandum for shares, and although, just as in the present case, the shares so subscribed for were never allotted and his name was not on the register for them, yet it was held that his name ought to have been on the register; that it was negligence on his part not to have put his name on; and that he was therefore a contributory in respect of those shares. According to that case, to make a subscriber to the memorandum liable, there is no necessity for a formal application or a formal allotment, for the effect of signing is to place him in exactly the same position as if he had sent a letter of application for the shares and received in return a letter of allotment. *Sidney's Case* (2) is another authority to the same effect. What was "understood" by *Gilman* and his co-directors to be his position when formally applying for 100 shares does not affect the clear law of the case, and is not admissible to alter the plain import of the written documents.

Marten, Q.C., and *Rawlins*, for *Gilman*:—

In the cases cited there had been no allotment of shares at all, and therefore they have no application to the present case where there was actual allotment followed by registration of shares in *Gilman's* name. We admit that subscribing the memorandum of association for a certain number of shares creates, under sect. 23, a contract on the part of the subscriber to become a member of the company: but we say that the subsequent allotment of a larger number of shares than that for which he subscribed the memorandum will cover the number for which he subscribed and satisfy the contract, provided he pays for the shares either "in meal or in malt": *Re Freen & Co.* (3); *Drummond's Case* (4). Here *Gilman* paid in cash for the 100 shares he formally applied

(1) Law Rep. 2 Ch. 427.
(2) Ibid. 13 Eq. 228.
(3) 15 W. R. 166.
(4) Law Rep. 4 Ch. 772.

for, and which the evidence shews were always understood and intended to include the fifty for which he had subscribed. It has been held that the contract created by subscribing the memorandum does not irrevocably bind the subscriber to matters not required by the Act to be stated in the memorandum. Thus, if the subscriber afterwards takes the full equivalent of the shares for which he has subscribed, he has fulfilled his obligation: *Duke's Case* (1). The letter of application cannot be regarded as a contract to take 100 shares independently of the fifty subscribed for, there being no intention to create such a contract: *Webb* v. *Smith* (2).

Hemming, in reply:—

Evans's Case (3) is precise as to the subscriber's liability under sect. 23; and the result is that if a director subscribes the memorandum for a certain number of shares he is not merely a person who has promised to apply for shares but an actual shareholder, and therefore, being a director, under the immediate obligation of putting his name on the register; and consequently, in settling the list of contributories when the company comes to be wound up, he must be treated as if, on the formation of the company, he had been the actual registered holder of the shares he subscribed for. Here the application for 100 shares was general and unqualified, and must be regarded as the application of a man who was already the holder of fifty shares and applied for 100 more.

BACON, V.C.:—

I cannot entertain any doubt about this case. In my opinion what was done by Mr. *Gilman* is palpably clear and consonant with good faith, and the application now made by the liquidator is an unreasonable one.

It is quite true that, after Mr. *Gilman* signed the memorandum of association for fifty shares, the obligation which the 23rd section of the *Companies Act*, 1862, casts upon a man who subscribes the memorandum of a company, was fixed upon him. He was bound

(1) 1 Ch. D. 620. (2) 30 Ch. D. 192.
(3) Law Rep. 2 Ch. 427.

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to take fifty shares. He fulfils that obligation by applying for a larger number of shares, including in his application the fifty for which he had subscribed the memorandum, making in all 100 shares. The 100 shares are allotted: they are registered in his name; they get into his hands, and all this is acquiesced in by the company. They take his money and allot him the shares. He had performed his obligation to take fifty shares, and he is the allottee of those shares. To say that, because he has taken a larger number of shares than he was obliged to take, he is therefore now liable in addition for the fifty shares which he was originally liable to take and did take, is, in my opinion, in the highest degree unreasonable. Who is injured by what has been done? The shareholders look into the register and find Mr. *Gilman's* name down for 100 shares. In my opinion he has done all the law requires him to do, and it would be unjust and unreasonable that he should be asked now to take a number of shares he never agreed to take when he is already a holder of the shares he did agree to take. None of the cases that have been referred to cover the present case. That which comes nearest to it is the case of *Re Freen & Co.* (1), where the one share subscribed for was reckoned under a subsequent allotment of ten shares for which application was made.

On the plain facts of the case, and on the evidence that has been adduced, it is clear that Mr. *Gilman* became bound to be a shareholder for the additional number of shares beyond the fifty for which he subscribed the memorandum, and that this liability he discharged. There is not the slightest doubt also that he was liable for the fifty shares for which he subscribed the memorandum and which he was under an obligation to take. That obligation he has also acquitted himself of.

I refuse the application with costs, but the liquidator, when he has paid the costs, will be entitled to have them repaid out of the assets of the company.

Solicitors: *Davidson & Morriss; Clarke, Rawlins, & Co.*

(1) 15 W. R. 166.

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WILLMOTT *v.* LONDON CELLULOID COMPANY.

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Feb. 1, 2.

[1884 W. 4298.]

Company—Winding-up—Debenture-holder—Mortgagee—Fraudulent Preference —Right of Action—Rule in Bankruptcy—Creditors.

The rule in bankruptcy that the doctrine of fraudulent preference cannot be enforced for the benefit of a single creditor or class of creditors, but only for the benefit of the general body of creditors, is applicable to the winding-up of a company under the *Companies Act*, 1862. Consequently, sect. 164 confers no right upon a debenture-holder of a company in liquidation to take proceedings on behalf of himself and the other debenture-holders to set aside a transaction on the ground of fraudulent preference.

B. and *H.*, directors of a limited company, *B.* being managing director, advanced moneys from time to time to the company to purchase goods and discharge pressing claims. In September, 1884, the company's premises were burnt down, and the insurance company admitted their liability to pay £3000 in respect of the damage. *B.* and *H.* then held a "directors' meeting,"—two directors forming a quorum—and passed resolutions for commencing actions against the company for the moneys advanced and for instructing a firm of solicitors to appear and consent on behalf of the company to immediate judgment. The actions were accordingly brought and immediate judgment taken by consent, and thereupon *B.* and *H.* obtained the £3000 from the insurance company under garnishee orders, the company being at that time insolvent. In December, 1884, the holder of a mortgage-debenture, in form a charge upon all the property of the company both present and future, brought an action on behalf of himself and the other holders of mortgage-debentures against the company, *B.* and *H.*, claiming (1) repayment of the £3000 by *B.* and *H.*, and (2) the usual relief in a debenture-holder's action. Two days after the issue of the writ a petition was presented for winding up the company, and shortly afterwards a winding-up order was made. At the trial the Plaintiff relied on sect. 164 of the *Companies Act*, 1862, as entitling him to recover the £3000 on the ground of "fraudulent preference":—

Held, that so much of his claim as was based on fraudulent preference must be dismissed with costs, but that he was entitled to the ordinary judgment for accounts and inquiries as to the debenture debt.

Ex parte Cooper (1) considered.

THE Defendants, the *London Celluloid Company, Limited*, were incorporated on the 4th of February, 1881, with a capital of £30,000 in £10 shares.

(1) Law Rep. 10 Ch. 510.

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One of the objects mentioned in the memorandum of association was to raise money in such manner as the company should think fit, and in particular by the issue of debentures charged upon all or any of the company's property (both present and future) including its uncalled capital: and by clause 48 of the articles of association, it was provided that the directors might from time to time at their discretion borrow from the directors, members, or other persons, any sum or sums of money for the purposes of the company, but so that the moneys at any one time owing should not, without the sanction of a general meeting, exceed one half of the capital from time to time paid up; and might raise or secure the repayment of such moneys in such manner and upon such terms and conditions in all respects as they should think fit, and in particular (but without prejudice to said generality) by the issue of debentures of the company charged upon all or any part of the property of the company.

In the month of April, 1883, the directors of the company raised a sum of £7000 by the issue of mortgage debentures (hereinafter called the "first mortgage debentures") carrying interest at £7 per cent. per annum and the principal being payable on the 24th of April, 1884.

The first mortgage debentures were all in the same form, and by each the company agreed to pay to the lender, or other the registered holder for the time being of the debenture, the principal sum thereby secured on the 24th of April, 1884, and in the meantime to pay interest thereon at the rate of £7 per cent. per annum by equal quarterly payments; and the company thereby charged with the payment of such principal sum and interest its undertaking and all its property both present and future, including its uncalled capital for the time being; and each such debenture was described as one of a series of debentures for securing the principal sum of £7000, and was stated to be issued upon and subject to the conditions indorsed thereon.

By the conditions indorsed on these mortgage debentures it was (amongst other things) provided that the debentures should rank *pari passu* as a first charge upon the property within mentioned; and that the charge created by the debentures should be a floating security, and that accordingly the company might in

the course of its business deal with and dispose of the property charged in such manner as the company might think fit.

The Plaintiff was the registered holder of twenty first mortgage debentures, all dated the 24th of April, 1883, and purporting to secure principal sums amounting in the aggregate to £1400.

The Defendants *Edward Hodson Bayley* and *Robert William Hanbury* were the registered holders of first mortgage debentures, and they also held certain other debentures (hereinafter called the "second mortgage debentures") for sums amounting in the aggregate to £1800, which were issued by the company subsequently to the first mortgage debentures.

The second mortgage debentures were in the same form as the first, except that they were subsequent in date and carried interest at £7 10*s.* per cent. per annum.

The Defendants *Bayley* and *Hanbury* were directors of the company, and had been such since its formation, being two of the directors named in the articles of association.

In the year 1882 the Defendant *Bayley* was appointed managing director. From time to time he and his co-director, the Defendant *Hanbury*, advanced various sums of money to the company by way of loan, to enable them to purchase stock and to discharge pressing claims, it being agreed that the loan should be repaid on demand with interest, and that the repayment should be a first charge on the property of the company. The Defendant *Bayley* alleged that, as an inducement to make the advances, it was understood that the company would allow them at any time to obtain judgment for the sums advanced, and thus obtain priority over the debenture debt.

In September, 1884, part of the company's works at *Crayford*, in *Kent*, and of the stock, plant, and machinery there, was destroyed by fire. The stock, plant, and machinery were insured, and the insurance company admitted their liability to pay to the company the sum of £3000. At that time the sum due to the Defendant *Bayley* from the company for advances amounted to upwards of £2450. A considerable sum was also similarly due to the Defendant *Hanbury*.

Shortly after the fire, the Defendants *Bayley* and *Hanbury* held

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a meeting as directors—two having been, by resolution, fixed as a quorum—and passed resolutions for commencing actions against the company to recover their advances, and for instructing a firm of solicitors to appear and consent on behalf of the company to immediate judgments. Thereupon the actions were commenced, and a firm of solicitors appeared for the company, and consented to immediate judgment in both actions. The Defendants *Bayley* and *Hanbury* then forthwith attached the £3000 in the hands of the insurance company under garnishee orders to answer the judgments, and having thus obtained payment of the money, they applied it in payment of the debts due to them.

At the time the £3000 was received by the Defendants *Bayley* and *Hanbury* the company was in an insolvent condition, and shortly afterwards, on the 6th of October, 1884, a distress was put into their works at *Crayford* by the landlords for arrears of rent amounting to about £400, but the Defendants *Bayley* and *Hanbury* themselves purchased the stock, machinery, and plant taken under the distress for £450 10*s.* 6*d.*

The £1400 secured by the Plaintiff's debentures being still due, together with an arrear of interest, the Plaintiff, on the 8th of December, 1884, brought this action, on behalf of himself and the other holders of mortgage debentures, against the company and Messrs. *Bayley* and *Hanbury*, charging the latter Defendants with having improperly received and retained the £3000 insurance money, knowing at the time that the company was hopelessly insolvent; also with having purchased the distrained chattels for their own benefit and at a price very much below their true value. He also charged the Defendant *Bayley* with having removed large quantities of celluloid from the company's works to his own, *Bayley's*, works in *Surrey*.

The Plaintiff claimed:—

(1.) A declaration that the first mortgage debentures constituted a first charge upon all the property of the company including its uncalled capital:

(2.) A declaration that the £3000 insurance money received by the Defendants *Bayley* and *Hanbury* formed part of the property of the company, and that the said Defendants were liable to repay such sum; and judgment against them accordingly:

(3.) A declaration that the celluloid removed by the Defendant *Bayley* from the company's works, and the machinery, stock-in-trade, and other chattels purchased by himself and *Hanbury* under the distress, respectively formed part of the property of the company, and that the said Defendants might be ordered to deliver up and account for the same respectively:

(4.) An account of what was due to the Plaintiff and the other holders of the first mortgage debentures for principal, interest, and costs:

(5.) That the first mortgage debentures might be enforced by foreclosure or sale: and

(6.) A receiver and manager of the property and business of the company.

Prior to the action the Defendant *Hanbury* admitted the Plaintiff's claim as against him, but the Defendant *Bayley* delivered a statement of defence, in which he detailed the items of the debt for which he afterwards obtained judgment against the company, and he alleged that by agreement with the company his advances were to be a first charge on their property. He further alleged that the company had no defence whatever to his action for debt; that it would have been most improper on their part to have resisted it: and that to protect his own interests he had himself effected the insurance of the company's premises, and advanced the premiums to keep it on foot. He submitted that, having regard to the facts of the case, and in particular to the fact that the insurance moneys were attached and paid before the issue of the writ in the present action, those moneys never were at any time, at all events not after being attached, subject to the charge created by the debentures in priority to the charge thereon in his favour. He also denied having removed celluloid from the company's works to his own; and with regard to the distress, he stated that in order to preserve the chattels for the company he and *Hanbury* agreed to advance moneys for the purchase of the chattels and to pay off the distress: that the purchase was thereupon effected, but the chattels were allowed to remain on the company's premises with a view to their being repurchased for the purposes of the business: that the price paid for them was fair and proper, being the value at which they had been appraised

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for the distress by two independent and competent brokers: and that so far as he, *Bayley*, was concerned, he was and always had been willing that the company should resume possession of the chattels on their paying him the moneys he had advanced towards their purchase.

The Plaintiff then joined issue, and the action now came on for trial.

The circumstances alleged in the Defendant *Bayley's* statement of defence, as to the advance to the company of the moneys constituting the debt for which he obtained judgment and as to the purchase of the distrained chattels, were duly proved in evidence. It was also proved that the celluloid alleged by the Plaintiff to have been removed by *Bayley* from the company's works had been sold by the receiver under *Bayley's* own order, together with the chattels which had been bought under the distress and allowed to remain on the premises as above mentioned, and that the entire proceeds had been paid into Court in the present action. It appeared from entries in the company's minute book, that during the months of September and October, 1884, the company was practically in an insolvent condition, and was being pressed by various creditors.

A question of fact was raised upon clause 48 of the company's articles of association as to whether the debenture debt exceeded one-half of the paid-up capital, but it was proved from the company's books that the debt did not exceed the limit.

On the 10th of December, 1884, two days after the issue of the writ in this action, a petition was presented for winding up the company, and a winding-up order was made on the 20th of December, 1884. An official liquidator was thereupon appointed, and he was afterwards appointed receiver in this action. The Plaintiff had duly obtained the leave of the Court to proceed with the action.

Millar, Q.C., and *J. G. Laing*, for the Plaintiff:—

The main object of the action is to recover the £3000 insurance money, the company's only substantial asset, and we contend that the retention of the money by the Defendants *Bayley* and *Hanbury*, two directors of the company, in discharge of their

debts at a time when the company was obviously and to their knowledge insolvent, is invalid as being a "fraudulent preference" under sect. 164 of the *Companies Act*, 1862, which enacts that "any such conveyance, mortgage, delivery of goods, payment, execution, or other Act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly": *Gas Light Improvement Company* v. *Terrell* (1). *Bayley* and *Hanbury*, being directors, were in the position of trustees for the company, and it was therefore their plain duty to act for the benefit of the company and not with regard to their own particular interests: *Sykes' Case* (2). A director cannot, as against his company, retain a benefit for himself in a matter in which, owing to his fiduciary position, he is unable to exercise an unbiassed judgment: *Weston's Case* (3).

Bramwell Davis, for the official liquidator of the Defendant company:—

The debentures being "a floating security," a declaration should be made in the form indicated in *In re Colonial Trusts Corporation* (4) and *Wheatley* v. *Silkstone and Haigh Moor Coal Company* (5).

Method, for the Defendant *Hanbury*, submitted to the judgment of the Court and offered to pay into Court the sum required to answer the Plaintiff's claim against him, after deducting the sum which he had contributed towards the purchase of the chattels under the distress.

Marten, Q.C., and *T. Ribton*, for the Defendant *Bayley*:—

The Plaintiff is not a person who can take advantage of the

(1) Law Rep. 10 Eq. 168.
(2) Ibid. 13 Eq. 255.
(3) 10 Ch. D. 579.
(4) 15 Ch. D. 465.
(5) 29 Ch. D. 715.

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doctrine of fraudulent preference: that doctrine is only intended for the benefit of creditors in general. This is a claim by a mortgagee, an individual creditor or the representative of a single class of creditors, and in bankruptcy the rule is that proceedings by a single creditor for his own benefit and not for the benefit of creditors in general cannot be maintained: *Ex parte Cooper* (1).

The 164th section, we submit, puts the law of fraudulent preference in the case of an insolvent company on the same footing as in an ordinary bankruptcy, and is therefore intended only for the protection of the general body of creditors. There is no authority for the proposition that a mortgagee coming, as in the present case, to establish his charge, can set aside a transaction on the ground of fraudulent preference. With regard to the fiduciary position of the Defendant directors, the case of *Gas Light Improvement Company* v. *Terrell* (2) was an action by the company: here the action is by a debenture-holder, a creditor of the company—an important distinction; for though a director is a trustee for his company he is not a trustee for the company's creditors, and he may therefore, without rendering himself liable to the creditors on the ground of fraudulent preference, repay himself money he has advanced for the benefit of the company: *Poole, Jackson, and Whyte's Case* (3). Moreover, the Plaintiff has not charged "fraudulent preference" by his pleadings. Fraud, if relied on by a plaintiff, must be distinctly alleged and as distinctly proved, and must not be left to be merely inferred from the facts: *Davy* v. *Garrett* (4). *In re Colonial Trusts Corporation* (5) and *Wheatley* v. *Silkstone and Haigh Moor Coal Company* (6) shew that where mortgage debentures constitute, as they do here, "a floating security" on the company's property, it is not until the company's business is put an end to by the appointment of a receiver or a winding-up order that the charge becomes fixed, the property actually subject to the charge being the property subsisting at that moment; otherwise a company which has issued debentures would never be able to use its property in carrying on its business. Consequently, this £3000

(1) Law Rep. 10 Ch. 510.
(2) Ibid. 10 Eq. 168.
(3) 9 Ch. D. 322.
(4) 7 Ch. D. 473.
(5) 15 Ch. D. 465.
(6) 29 Ch. D. 715.

insurance money, which was paid while the company was a going concern, was capable of being dealt with by the company in any way they chose, without regard to any claims by the debenture-holders. *Bayley* and *Hanbury* under their wide powers as directors, two directors forming a quorum, were entitled to pass resolutions as to the disposition of the money. As agents of the company, and having expended money for the company's benefit, they were entitled to reimburse themselves out of any money coming to their hands. The company do not deny that the advances were made, and they had in fact no defence to the action which *Bayley* and *Hanbury* were perfectly entitled to bring in order to recover their debt. Again, the Plaintiff was never in point of fact entitled to the benefit of the insurance policy at all; for in the absence of express declaration in his mortgage or purchase-contract, a mortgagee or purchaser is not entitled to insurance money: *Lynch* v. *Dalzell* (1); *Lees* v. *Whiteley* (2); *Rayner* v. *Preston* (3).

Millar, in reply:—

The evidence is clear, that in September and October, 1884, the company was *in extremis*; both the Defendant directors knew it, and it was the cause of their bringing their actions for debt. The cases cited do not touch the question whether these Defendants were not guilty of fraudulent preference at the time when a winding-up was imminent.

BACON, V.C.:—

The Plaintiff in this case sues two persons who are directors of the *London Celluloid Company*, and the company itself, which is now under the operation of a winding-up order.

The object of the suit is twofold. First, the Plaintiff seeks to recover, under the very wide terms of his mortgage, a sum of money which was received by the Defendants *Bayley* and *Hanbury* from the insurance company as compensation for the damage which had been caused by fire on the premises which belonged to the company. That is the first and distinct claim. The other is one which is not, in fact, disputed, and it is that under his

(1) 4 Bro. P. C. Tomlins' Ed. 431. (2) Law Rep. 2 Eq. 143.
(3) 18 Ch. D. 1.

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title as debenture-holder he is entitled, like any other mortgagee, to realize the property comprised in his security. The two grounds of action are, therefore, distinct. The Plaintiff claims under the 164th section of the *Companies Act*, which deals with the case of fraudulent preference; and he says that the two directors, the Defendants *Bayley* and *Hanbury*, did, for their own ends, in their own interest, and in breach of their duty to the company of which they were directors, procure the payment, by means of the actions, judgments, and garnishee orders which have been referred to, of the moneys which were payable by the insurance company; and he insists that the 164th section gives him a title to recover those moneys. I cannot help thinking that that is a total misapprehension of the effect of the 164th section. In Bankruptcy, and only in Bankruptcy as far as I know, the doctrine of fraudulent preference found a place in the jurisprudence of this country. A winding-up is, in point of fact, a bankruptcy, and the doctrine is also applicable to a winding-up.

The 164th section, however, relates only to a case similar in all respects to that which would arise in Bankruptcy, and the very words of the 164th section put this beyond the possibility of doubt. This Act of Parliament, dealing as it does with an insolvent company, that is, a bankrupt company, and making provision for the benefit of the creditors, of the shareholders, and of all other persons interested, declares by the 164th section that a fraudulent preference shall be set aside and held to be void for the benefit of the creditors—that is, the creditors in the winding-up. No other persons have any right to raise the question of fraudulent preference. The position of the Plaintiff in the present case is plain upon the Act of Parliament; it is plain upon principle; but it is abundantly plain having regard to the case of *Ex parte Cooper* (1), for there the very point now raised was decided. That was a case in which a creditor who alleged that he had a security from his debtor made an application to the Registrar in the bankruptcy of his debtor for the purpose of establishing his own security by setting aside another security given to one *Balli*, which he alleged constituted a fraudulent preference. The Registrar refused the application with costs,

(1) Law Rep. 10 Ch. 510.

but was prevailed upon, for some reason or other which I need not inquire into, to give the applicant leave to use the name of the trustee in endeavouring to set aside the fraudulent preference which he alleged existed. But both points were, on appeal, decided against him. His right to sue in Bankruptcy was decided against him; and his right to use the name of the trustee was decided against him, and the observations of the Lords Justices are in such clear terms and so concise that I cannot do better than read them. In the course of the argument the counsel for the applicant alleged that the fact that he had a remedy in Equity was no reason why he should not be allowed to dispute the claim of *Balli* in Bankruptcy on the ground of fraudulent preference. Lord Justice *James* upon that says (1): "How can there be a fraudulent preference by delivery of goods that do not belong to the bankrupt? You say 'that the goods were not the bankrupt's, but yours." And Lord Justice *Mellish* says: "The doctrine of fraudulent preference is entirely for the purpose of distribution among the creditors generally; not for the benefit of any single creditor;" an observation that applies directly to the Plaintiff here, although he sues on behalf of himself and all the other holders of debentures. But, in delivering judgment, Lord Justice *James* says: "Probably the Registrar thought that it might do some good to permit *Webb* (the original applicant) to use the trustee's name, and could not do any harm if he made the application at his own risk. But I think the trustee's name ought not to be used by an incumbrancer unless he is willing to give up his claim on the property recovered for the benefit of all the creditors." What might have been the case if there had been any such offer here on the part of the Plaintiff I need not inquire. Not only is it not made or even suggested, but directly the contrary is argued and insisted upon. Then Lord Justice *Mellish* says: "I am of the same opinion. I think the trustee ought not to make an application himself, or to allow an application to be made in his name, to recover property alleged to have been given to a creditor by way of fraudulent preference, except for the benefit of all the creditors. He ought not to do so simply for the purpose of benefiting a single creditor. The order, so far

(1) Law Rep. 10 Ch. 511, 512.

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as it permits the name of the trustee to be used, must be discharged."

A plainer decision upon the point which has been argued before me it is difficult to conceive. It is a total misapprehension of the law to suppose that a mortgagee, however ample the terms of his security may be, can seek to have the benefit of the 164th section which is made solely for the benefit of the creditors. It may be said in some sense that he is a creditor, but he is only entitled to share with the other creditors; and, as is pointed out by the Lord Justice, if that is his claim, he must at once relinquish his security; he must throw it into the mass.

What the official liquidator might do against the Defendants in the way of fraudulent preference is a totally different question, and one which is not before me, but which I cannot disregard, considering the length at which the point has been argued. It has been argued that this was a fraudulent preference upon two grounds, one, that the "trustee," as he is called—trustee only for the company, not trustee for the mortgagee—has betrayed his trust by preferring his own interest to the interest—of whom? Not the mortgagees but the creditors. That is the complaint made against him.

[His Lordship then dealt with the question as to whether the powers of borrowing given by clause 48 of the articles of association had been exceeded, and held that the evidence had not satisfied him that there had been an excess of those powers. His Lordship then proceeded:—]

In my opinion the Plaintiff is not entitled to proceed under the 164th section, for in retaining his security he would be acting directly against the principle of distribution: he would be retaining a part of the insolvent estate and asking to take a part of what remained after it had been diminished by his retention.

Upon the ground of fraudulent preference I think, therefore, that this action is totally mistaken. I think that there is no ground whatever upon which this Plaintiff and the persons associated with him can by any possibility be said to have a right to sue in respect of the fraudulent preference.

So much of the case, therefore, as relates to the claim involved

in the question of fraudulent preference, namely, paragraphs 1 and 2 of the Plaintiff's claim, must be dismissed with costs. But, then, the Plaintiff is a mortgagee and his right as mortgagee is not and cannot be disputed. Within his security is comprehended the stock of celluloid and machinery and implements, and so on, which have been taken possession of and have been sold by the receiver. There must be an account of that because it is part of his mortgage security. There must be an inquiry who are entitled as debenture-holders, an inquiry of what the assets of the company consist, and the distribution of those assets will be the subject of future consideration when the Court comes to deal with the facts which may be found by certificate. The costs of this second branch of this case, the first having, in my judgment, been wholly cut away and disposed of, must be reserved to be dealt with hereafter.

The Defendant *Bayley* must be repaid out of the money in Court the amount he paid to redeem the chattels sold under the distress.

Solicitors: *F. H. Honey; E. Lee; Paterson, Snow, Bloxam, & Kinder; Lindo & Co.*

G. I. F. C.

In re NEAL.
WESTON *v.* NEAL.

[1884 N. 840.]

Practice—Action—Trial—Contempt—Non-payment of Costs—Staying Proceedings.

Where a plaintiff is in contempt through breach of an order for payment of the costs of an application in the action, the Court will, at the instance of the defendant, upon the action being called on for trial, stay all further proceedings until the plaintiff has cleared his contempt. An application for payment prior to the case being called on is not necessary.

THE Plaintiff was a widow in a humble position of life and of no means, and the Defendants were the legal personal representatives of a testator, *John Neal*, deceased, and beneficiaries under his will. The action was brought by the Plaintiff as a creditor

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of the testator, on behalf of herself and the other creditors, and claimed payment of her debt, or, in the alternative, administration.

By an order made in the action on the 26th of March, 1885, upon an application by the Plaintiff for accounts under Order XV., rule 1, the Plaintiff was ordered to pay the Defendants their taxed costs of the application.

On the 24th of July, 1884, the Taxing Master certified that he had taxed the costs at £55 19*s*. The Plaintiff had not yet paid any part of these costs.

Upon the action, which was set down to be heard with witnesses, being called on for trial,

Horton Smith, Q.C., and *F. Webb*, for the Defendants, raised the preliminary objection that the Plaintiff was in contempt for not having complied with the order for payment of costs, and that all further proceedings by the Plaintiff ought to be stayed until the costs were paid: *In re Youngs* (1). This was the old practice: *Wilson* v. *Bates* (2); *Bradbury* v. *Shawe* (3); *White* v. *Bromige* (4); *Seton* on Decrees (5): and still remains in force: Order LXXII., r. 2.

Marten, Q.C., and *Church*, for the Plaintiff:—

This application is too late. It is unreasonable, when the action is called on for trial, to raise such an objection as this: the amount of taxed costs payable under the order was ascertained more than six months ago, and yet no demand for payment is made until the day of trial when we have incurred all the expense of having our witnesses in attendance. There is no instance of such an objection being raised at the hearing or trial of an action. In *In re Youngs* and the other cases cited, the application to stay proceedings was made before trial, when no expense had been incurred. Moreover, in *Wilson* v. *Bates* it was expressly decided that a plaintiff was not estopped from asserting his rights merely through being in contempt for non-payment of costs.

(1) *Ante*, p. 239.
(2) 3 My. & Cr. 197.
(3) 14 Jur. (O.S.) 1042.
(4) 26 W. R. 312.
(5) 4th Ed. pp. 1539, 1542.

Horton Smith, in reply:—

As to our not having made a demand on the Plaintiff to pay the costs according to the order, no such demand was made, or held to be necessary, in *In re Youngs* (1). We shall be satisfied if the Plaintiff's solicitor gives an undertaking to pay within a certain time.

BACON, V.C.:—

The practice appears to me to be established, and a very wholesome practice it is, especially having regard to the nature of the case I am now called upon to hear. I find the practice is established by the older authorities, and a recent case has been cited to me, *In re Youngs*, in which Mr. Justice *Pearson* has followed those authorities. To say that the Defendants are in default in not having applied for payment earlier, does not lie in the mouth of the Plaintiff, because the Defendants might very fairly have been expecting all this time to receive payment of the £55 19*s.*, and indeed that the order would be obeyed even at this the last moment. Until, therefore, the Plaintiff clears her contempt by paying the money, all further proceedings must be stayed.

The Plaintiff's solicitor then offered and the Defendants' solicitor accepted a cheque drawn by the Plaintiff's solicitor for the costs in question, whereupon his Lordship permitted the Plaintiff's counsel to open her case.

Solicitors for Plaintiff: *F. J. & G. J. Braikenridge*, agents for *J. B. & T. Knowles, Burton-upon-Trent.*

Solicitors for Defendants: *Palmer, Eland, & Nettleship*, agents for *T. Wight, Dudley.*

(1) *Ante*, p. 239.

G. I. F. C.

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In re JONES.
CALVER *v.* LAXTON.

[1883 F. 276.]

Administration of Estates—Executor—Right of Retainer—Hinde Palmer's Act, 1869 (32 & 33 *Vict. c.* 46) [*Revised Ed. Statutes, vol. xvi., p.* 83]—*Appointment of Receiver.*

In a creditor's administration action brought against an executrix, who was also a creditor of the testator, a receiver was appointed, who obtained possession of certain legal assets as to which the executrix would have had a right of retainer if they had come to her hands:—

Held, following with reluctance *Richmond* v. *White* (1) and *In re Birt* (2), that after the appointment of the receiver the executrix could not claim retainer out of any assets got in by him.

The estate was insolvent, there were both specialty and simple contract creditors, and the executrix, who was a simple contract creditor, had got in certain legal assets before the receiver was appointed:—

Held, that she could only exercise her right of retainer as against creditors of equal degree with herself; and accordingly, that, the assets being treated as divided rateably among the specialty and simple contract creditors, she could retain her debt against the dividends payable to the simple contract creditors to the extent of the legal assets received by her.

Hinde Palmer's Act, 1869, the object of which was only to place specialty and simple contract creditors on an equal footing *inter se* for the purpose of distribution, ought not to be so construed as to give incidentally to an executor the power to defeat specialty as well as simple contract creditors; although the Act, by augmenting the fund for the payment of simple contract debts, has to that extent enlarged the right of retainer.

Wilson v. *Coxwell* (3) approved.

In re Williams' Estate (4) distinguished.

FURTHER CONSIDERATION.

This was a creditor's administration action brought against *Frances Catherine Laxton*, who was the sole executrix, legatee and devisee of the real estate of the testator, *Henry Jones*, and also one of his creditors.

Upon the hearing in April, 1883, the usual judgment was given for the administration of the real and personal estate of the testator, and an order was made for the appointment of a receiver to receive the rents and profits of the real estate, and

(1) 12 Ch. D. 361.
(2) 22 Ch. D. 604.
(3) 23 Ch. D. 764.
(4) Law Rep. 15 Eq. 270.

to collect and get in the outstanding personal estate of the testator.

In pursuance of this order one *T. L. Reed* was appointed receiver in Chambers on the 26th of September, 1883. When the appointment was made the Chief Clerk entered in the margin of his notes the following memorandum: "It is distinctly understood that this is not to prejudice the Defendant Mrs. *Laxton's* right of retainer (if any)." Nothing of the kind was, however, inserted in the order itself, which was in the usual form.

In the course of the proceedings the claim of the Defendant was allowed at the sum of £1498, and the receiver obtained possession of certain legal assets of the testator, as to which the Defendant's right of retainer as executrix would have been operative if they had come to her hand in the ordinary course. By his certificate, made in June, 1885, the Chief Clerk found (*inter alia*) that the receiver had been appointed without prejudice to the Defendant's right of retainer, if any. There were both specialty and simple contract creditors of the testator, and the estate being insolvent, the principal question now to be determined was whether and how far the right of retainer of the executrix, who was a simple contract creditor, had been affected under the circumstances.

W. Pearson, Q.C., and *Begg*, for the Plaintiffs :—

The Defendant's right of retainer is gone. An executor's right of retainer only operates as to legal assets actually come to his hands, and cannot therefore apply to assets got in by a receiver: *In re Birt* (1); *Richmond* v. *White* (2). There is nothing in the order appointing the receiver expressive of its being made without prejudice, and the understanding referred to in the note of the Chief Clerk must have had reference to assets already come to the Defendant's hands.

But if her right is not gone, she is only a simple contract creditor, and cannot retain her debt until the specialty creditors have been paid 20*s.* in the pound. For there is no right of retainer except against creditors of equal degree. *Hinde Palmer's Act*, 1869 (32 & 33 Vict. c. 46, s. 1), only placed simple contract

(1) 22 Ch. D. 604. (2) 12 Ch. D. 361.

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and specialty creditors upon the same footing *inter se* as regards the distribution of assets, and neither abolished nor enlarged the right of retainer, which, therefore, can only be exercised, in this case, as against such funds as would have been applicable for the payment of simple contract debts before the passing of that Act: *Wilson* v. *Coxwell* (1); *Crowder* v. *Stewart* (2); *In re Illidge* (3).

Hastings, Q.C., and *Bardswell*, for the executrix:—

Upon principle the appointment of a receiver whose duty it is to preserve the fund for the benefit of the persons who are beneficially entitled to it ought not to affect the rights of the parties *inter se*, including the right of retainer, any more than the payment of the fund into Court, which clearly does not affect that right: *Richmond* v. *White* (4). Nor is there any authority directly deciding that the appointment of the receiver *per se* takes away an executor's right of retainer, for in *In re Birt* (5) there were special circumstances which precluded the defendant from exercising any right which he otherwise might have had, and amounted to waiver. Here the executrix expressly stipulated that the appointment was to be without prejudice to her right of retainer.

Then upon the question whether the Defendant is entitled to retain as against the specialty creditors, the effect of *Hinde Palmer's Act* of 1869 has been to put an end to the distinction between simple contract and specialty creditors, and to place them all upon the same footing, so that all creditors being now of equal degree, the executor has a right of retainer against all of them.

[They referred to *Wilson* v. *Coxwell*, *Davenport* v. *Moss* (6), and *In re Morris's Estate* (7).]

W. Pearson, in reply, referred to *Seton* on Decrees (8).

In the course of the argument, the cases of *Walters* v.

(1) 23 Ch. D. 764.
(2) 16 Ch. D. 368.
(3) 24 Ch. D. 654.
(4) 12 Ch. D. 361.
(5) 22 Ch. D. 604.
(6) 14 W. R. 453.
(7) Law Rep. 10 Ch. 68.
(8) 4th Ed. vol. i. p. 427.

Walters (1) and *In re Compton* (2) were referred to by Mr. Justice *Kay*.

Dec. 19. KAY, J.:—

The question which has to be determined is as to the existence and extent of an executor's right of retainer.

The first point is, whether I can give the executrix in this case the benefit of the understanding mentioned in the note made by the Chief Clerk. If it had been expressed in the judgment which ordered the appointment of a receiver, I should do so as a matter of course. But after that order it was impossible for the executrix to resist the appointment, all she could do would be to object to the person nominated. By such objection she might have delayed the actual appointment and possibly have got into her own hands some of the assets in the meantime, and the Plaintiff may have acceded to the suggestion that the Defendant would withdraw such opposition if her right of retainer was left unaffected.

It is argued that this was what in fact took place, and that the Plaintiff, as *dominus litis*, notwithstanding the judgment, could bind all the creditors by such an agreement. For it is said he need not have insisted upon the appointment of a receiver at all —but notwithstanding the judgment he might have allowed the executrix to continue to receive the testator's assets.

But I have inquired of the Chief Clerk, and I gather from him that he does not consider that there was any absolute condition of this kind agreed to, and for that reason, although he has referred to it in the certificate, he did not think it right to mention it in the order.

Then the question is whether, in the absence of such a condition, the appointment of a receiver does interfere with the executor's right of retainer. I confess it seems to me there are very strong reasons why it should not? Even in the case where a receiver is appointed against an executor hostilely on account of misconduct, it never is intended to punish the executor by destroying his legal right of retainer. It would be very reasonable

(1) 18 Ch. D. 182. (2) 30 Ch. D. 15.

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to hold that as the receiver is only an officer of the Court appointed to protect the fund, his appointment ought not to interfere with any legal rights other than the actual possession of the property, and that the effect should be only the same as where the assets are paid into Court, in which case the right of retainer is unaffected. But the difference is this—when the assets are paid into Court, there being no receiver, that is done with the assent of the executor, and it is the same for this purpose as if they had passed through his hands; but when a receiver is appointed a debtor to the estate may pay his money direct to the receiver and obtain a good discharge, so that the appointment of a receiver prevents the money actually or theoretically coming to the executor's hands; and without possession there can be no retainer.

This seems to have been the view of Lord Justice *Cotton* in *Richmond* v. *White* (1), and, I think, also of Lord Justice *Fry* in the case of *In re Birt* (2). And I therefore, with some reluctance, must follow these authorities.

But there are certain other legal assets which did actually come to the hands of the executrix before the receiver was appointed, and as against these her right of retainer is unquestionable, the only doubt being to what extent it can be exercised. The executrix is a simple contract creditor. There are specialty as well as simple contract debts. The statute 32 & 33 Vict. c. 46, after reciting that it is expedient to abolish the distinction as to priority of payment between specialty and simple contract debts of deceased persons, enacts that "in the administration of the estate of every person who shall die on or after the 1st of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: Provided always, that this Act shall not prejudice

(1) 12 Ch. D. 361. (2) 22 Ch. D. 604.

or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt."

The Plaintiff argued that this leaves the right of retainer entirely unaffected, and that it can only be exercised as against such fund, if any, as would before the Act have been applicable to pay the simple contract debts. On behalf of the executrix it is argued that the specialty creditors are now put to all intents and purposes in the position of simple contract creditors, and that she may retain out of the fund applicable to payment of both.

There is a third view, which is that the effect of the statute has been to augment the amount divisible among the simple contract creditors, and that the right of retainer is benefited by being now exercisable against that augmented amount.

I think the object of this Act was only to deprive the specialty creditor of his priority in the distribution of a fund as between himself and the simple contract creditors. For the purpose of that distribution they stand on equal degrees. For all other purposes his position as a specialty creditor remains unaltered.

He may recover his debt at any time within twenty years. He has the advantage of an easier remedy by action.

One mode of testing the claim of the executrix is to try the effect of it in various cases. If the debt of the executrix were enough to exhaust the assets, she could defeat all the specialty creditors. If she takes it out of the whole fund, though that fund is more than sufficient to satisfy her debt, she would diminish proportionally the dividends payable to both classes. In either case she would gain incidentally an advantage against the specialty creditors.

Is it a reasonable construction of the Act to say that this is the necessary consequence of it?

In *In re Williams' Estate* (1), Vice-Chancellor *Wickens* held that a simple contract creditor who had obtained judgment, but whose judgment was unregistered, had priority over all creditors of the same rank, *i.e.*, over all simple contract creditors, and that the effect of this statute by putting specialty creditors in equal degree with simple contract creditors was indirectly to give him

(1) Law Rep. 15 Eq. 270.

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priority over the specialty creditors also, which he would not have had before the Act. That decision is mentioned without disapproval by the late Master of the Rolls in the case of *In re Stubbs' Estate* (1), and by Lord Justice *Lindley* in *Smith* v. *Morgan* (2), where it was held that neither this statute nor the 10th section of the *Judicature Act*, 1875, took away his priority. It does not appear, however, whether in this last-mentioned case there were any specialty creditors. *Lee* v. *Nuttall* (3) decided that the 10th section of the *Judicature Act* did not affect the right of retainer. In *Crowder* v. *Stewart* (4) it was argued that as the Act put an end to the distinction between specialty and simple contract debts, and made all assets equitable, the right of retainer must either be extended to equitable assets or abolished. Vice-Chancellor *Malins* said (5), after reading the words of the statute: "It does not say a word about the right of the executor to retain. Mr. *Pearson* says this must have been the intention, because otherwise this most unjust law as to the right of retainer has been greatly extended. That may be so. Undoubtedly the law was that a creditor by simple contract could not retain as against a specialty creditor, but the difference being abolished, he now has a right of retainer; that however is simply the result of the enactment that all the distinctions between specialty and simple contract debts should be abolished. Therefore the executors have the right of retainer against all creditors instead of against some only." In *Wilson* v. *Coxwell* (6), in which the last-mentioned case was cited, Mr. Justice *Pearson* held that all the assets should be apportioned among the specialty and simple contract creditors equally, and that the executor could only retain out of the dividends payable to the simple contract creditors, he being a creditor of that class.

At first sight the decision in *In re Williams' Estate* (7) seems to be analogous to the present case, but upon examination there is a considerable distinction. The judgment creditor was no longer a simple contract creditor, but had attained a higher rank than simple contract creditors in the distribution of assets, and the

(1) 8 Ch. D. 154.
(2) 5 C. P. D. 337.
(3) 12 Ch. D. 61.
(4) 16 Ch. D. 368.
(5) Ibid. 370.
(6) 23 Ch. D. 764.
(7) Law Rep. 15 Eq. 270.

effect of placing specialty creditors for the purpose of distribution on the same level was necessarily to put them after the judgment creditor.

But here the executrix who desires to retain is only a simple contract creditor, and the law that she cannot retain against specialty creditors remains unless the statute must be read that for this purpose, among others, the specialty creditors are of equal degree with the simple contract creditors.

The object of the statute was only to take away the priority of a specialty creditor over simple contract creditors, not to give any of them priority over him. Equality between them in case of distribution is the declared purpose.

It does not appear from the report of *Crowder* v. *Stewart* (1) that the question was actually decided. The words of the Vice-Chancellor, which I have quoted, seem to be used in answer to the argument that the right of retainer must be treated as abolished by the statute because otherwise this consequence would follow.

Mr. Justice *Pearson*, who urged that argument, has in the later case decided the point otherwise, and his decision, although altered by the Court of Appeal for another reason, has not been interfered with in this respect.

The right of retainer, as it produces inequality, is never assisted: *Hopton* v. *Dryden* (2); and I do not think that a statute, the object of which is to effect equality of distribution, should be construed to give incidentally the power to defeat specialty as well as simple contract creditors.

I cannot help the conclusion that the Act having augmented the fund for payment of simple contract creditors, has to this extent enlarged the right of retainer. In this respect I agree with Mr. Justice *Pearson's* decision in *Wilson* v. *Coxwell* (3).

The assets being treated as divided rateably among the specialty and simple contract creditors the executrix may retain her debt against the dividends payable to the latter to the extent of the legal assets received by her.

(1) 16 Ch. D. 368.
(2) Prec. in Ch. 179; 2 Eq. C. Ab. 450.
(3) 23 Ch. D. 764.

KAY, J.

1885

In re JONES.

CALVER *v.* LAXTON.

The order as drawn up was, so far as material, as follows:—

"It appearing that the said testator's assets will not be sufficient, &c., declare that such assets after payment thereout of the costs hereinafter directed to be taxed ought to be apportioned rateably between the said testator's creditors by specialty and his creditors by simple contract . . . . in proportion to the aggregate amounts of the debts appearing by such certificate to be due to the creditors by specialty and the creditors by simple contract respectively: And declare that the Defendant, the executrix, ... is entitled to retain out of the amount to be apportioned to the simple contract creditors in part satisfaction and discharge of her debt of £1498 . . . . the sum of £164 17*s.* 3*d.* being the balance certified to be due from her in respect of the personal estate of the said testator come to her hands before the appointment of the receiver in this action" (then after orders for taxation of and sale and payment for costs) "order that the residue of the funds mentioned in the said schedule, increased for the purpose of computation by the said £164 17*s.* 3*d.*, be apportioned between the said specialty and simple contract creditors in proportion to the aggregate amounts of the specialty debts and the simple contract debts respectively: And order that the aggregate amount to be apportioned, having regard to the declaration aforesaid to the said creditors by specialty, be apportioned among such specialty creditors rateably in proportion to the amounts certified to be due to them, and that the amounts so to be apportioned be certified; and that the aggregate amount to be apportioned, having regard to the declaration aforesaid, to the creditors by simple contract, after deducting from the total amount to be apportioned in respect of such simple contract debts the said sum of £164 17*s.* 3*d.* so to be retained by the Defendant as aforesaid, be apportioned among such simple contract creditors rateably in proportion to the amounts appearing by the Chief Clerk's certificate to be due to them respectively, but in the case of the Defendant having regard to such retainer of £164 17*s.* 3*d.* as aforesaid." [Then followed directions for payment accordingly.]

Solicitors: *W. B. Brook; Burton, Yeates, Hart, & Burton,* for *E. M. Beloe, King's Lynn.*

W. W. K.

DUGUID *v.* FRASER.

KAY, J.

1886

Jan. 16.

[1867 D. 44]

Will—Power to appoint to Husband and Children—Appointment in favour of Objects of Power—Death of one Child—Invalid Appointment by Codicil—Revocation by Codicil.

Testator by will, who said his estate would realize at least £10,000, wished £4000 to be invested on trust for his sister, *A. P.*, for her life. At her death the principal might be divided between her husband, if surviving, and children as she might by will determine. After giving other legacies, the testator bequeathed the remainder to the children of *J. F.* A sum of £4000 was invested in consols and transferred into Court.

A. P. by will gave all the residue of her property, including the sum of £4000 left to her by the testator, and over which she had a disposing power to her husband and children in equal shares. One son after the date of the will died, leaving two children, and by a codicil made afterwards *A. P.* bequeathed the share which would have gone to him in trust for his children. On petition by the husband and surviving children for sale of the trust fund and payment of the proceeds to them :—

Held, that the invalid appointment by the codicil did not operate as a revocation *pro tanto* of the gift by the will to the class, and that the husband and surviving children were entitled to the whole of the fund.

PETITION.

Colonel *Alexander John Fraser*, who died in November, 1866, by his will made in 1858, after stating that his property and personal estate would realize at least £10,000, said, "I would wish £4000 to be invested under trustees for behoof of my sister, Mrs. *Ann Prentice*, now of *Sunnyside Lodge*, near *Lanark*, that she might have a secure income from the interest during her lifetime, at her death the principal may be divided between her husband, if surviving, and children as she may by will determine." The testator then said that he wished £2000 to be invested in the same way for behoof of two other persons named, but in the event of the death of one or both of them he wished it to go to his cousins, children of *John Fraser*. He wished £1000 to go to another person named for life, and at her death to be divided between his three *Russell* cousins and another person named, and he concluded thus :—"I bequeath the remainder to the children of *John Fraser*, my cousins. I consider the remainder should be at

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least £2500, if not the former bequests are to be curtailed in proportion to my intention." The testator then named as his executors two persons, one of them being the Plaintiff in the action. A suit was instituted in 1867 for the administration of the trusts of the will and the usual decree for accounts and inquiries was made.

The Chief Clerk's certificate shewed that *Ann Prentice* had six children.

One of them died in 1880, leaving two children.

By an order made in 1873, a sum of £4170 7*s.* 7*d.* consols to answer the legacy of £4000 was carried to the credit of the action.

Ann Prentice, who died in February, 1885, by her will made in December, 1878, after making certain bequests said :—"As to all the residue of my property and effects which I may die possessed of, including the sum of £4000 sterling left to me by my half-brother, Colonel *Alexander John Fraser*, C.B., and invested in consols, and over which I have a disposing power, I leave to my husband and children in equal shares to each individual," and she appointed two executors.

By a codicil to her will made in September, 1880, *Ann Prentice*, after reciting that since the date of her will her son *James* had died, bequeathed the share of the residue of her estate which would have gone to her son *James* had he survived her to three persons named in trust for the two children named of her said son *James* until they became of the age of twenty-one years, then to be paid over to them in equal shares, and in case of the death of either before attaining such age, the whole to go to the survivor, and in case of the death of both one half to go to their mother, and the other half to the brother and sisters of her son *James* and the children of any deceased equally *per stirpes*.

At *Ann Prentice's* death her husband and four children were living. They presented a petition claiming to be entitled to the sum which was invested in consols in fifths, and prayed that it might be sold and the proceeds paid to them.

Godefroi, for the Petitioners, submitted that the appointment by the codicil was invalid, and as there was no express revocation

by the codicil of the appointment by the will, that appointment must have effect, and the petitioners were therefore entitled to the fund as prayed by the petition.

Seward Brice, for the Rev. Dr. *Fraser*, one of the children of *John Fraser*, and a respondent, after referring to the cases of *Harvey* v. *Stracey* (1), *Bruce* v. *Bruce* (2), *Cotter* v. *Layer* (3), and *Quinn* v. *Butler* (4), and to *Farwell* on Powers (5), submitted that there was one appointment to a number of persons taking together. Some were within and some outside the power. Those who were within it could take only the shares which the donee of power had actually given to them. There was quite sufficient to shew that the intention of the appointor was to limit the shares to that part which was given to the petitioners, and as to the remainder she had impliedly revoked the appointment by her will to her son *James*, and given that share, which she looked upon as his own, in a way which was invalid, and the consequence was that it had devolved as unappointed to the children of *John Fraser*, to whom the testator bequeathed the remainder of his estate.

C. B. McLaren, for the Respondents, the executors, said that it was their desire that the children of *James* should have the share.

KAY, J.:—

This case raises a rather curious question. A special power of appointment was given to a married lady, the objects of which were her husband and children, and in default of appointment the fund would go, not to that class, but to different persons. She made her will, and thereby appointed the whole fund to her husband and children. That was a gift to a class so far as the children were concerned, and therefore if any of the children died in her lifetime those living at her death would constitute the class, and the whole fund would be divisible amongst the husband,

(1) 1 Drew. 73.
(2) Law Rep. 11 Eq. 371.
(3) 2 P. Wms. 623.
(4) Law Rep. 6 Eq. 225.
(5) Page 179.

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if alive, and those children. One of the children, her son *James*, died in her lifetime, and thereupon she made a codicil to her will, and by it she did not in terms revoke the appointment made by the will, or any part of it, but, after reciting the fact of the death of the son, she appointed the share which would have gone to him if he had survived her, to his two children, who were not objects of the power, and therefore that appointment was invalid. A question has been raised between the surviving children, members of the original class of appointees and proper objects of the power, and the persons who would be entitled to the fund in default of appointment under the instrument which created the power, as to who are now under the circumstances entitled to the share of the deceased son.

It was contended that the will and codicil should be read together, and that reading them together there was only an appointment of the fund to the husband and children, less the share; and the share having been invalidly appointed by the codicil, the appointment as to it fails, and it goes to the persons who would be entitled in default of appointment. The answer to that is that there was a complete appointment by the will of the donee of the power which carried the whole fund, and that the appointment by the codicil did not in terms purport to be a revocation of the prior appointment, and a new appointment; but it was simply an appointment which, no doubt, if it took effect at all, would in fact operate as a revocation to that extent of the appointment contained in the will. But it did not purport to be so, nor were there any words of revocation.

I have not been furnished with any authority to shew that under circumstances of this kind the persons entitled in default of appointment have been held to be the persons to take, and I should be extremely loath to make such a precedent now.

There have been cases where the intention to revoke in any event being clear, as where the appointor began the invalid appointment by saying "I revoke the former appointment to this extent," and then proceeded to appoint—in which the Courts have been compelled by the language to give effect to the revocation, though not to the subsequent appointment. I do not feel

myself fettered by anything of that kind. If the appointment by the codicil could take effect at all, it would be by way of revocation *pro tanto* of the gift in the will, which had an effect over all the fund unless the codicil altered it; but seeing that there was no express revocation, and that the attempt to appoint by the codicil was altogether invalid, I do not feel myself bound to say that the appointment by the codicil being bad, there was a revocation of the original appointment. It was said that I ought, so far as may be, to carry out the intention of the donee of the power. It is impossible to do that, because her intention was to benefit her grandchildren, who were not objects of the power; so that, if the will and codicil be taken together, it will be found that the intention cannot be carried out. It seems to me that I am not bound to make a revocation which I cannot conceive the donee of the power would have made if she had known that the appointment by her codicil could not take effect.

I think that the original appointment was not affected by the subsequent attempt to make an appointment, but which was invalid, and therefore the petitioners are entitled, after the costs of all parties have been paid, to the whole fund.

Solicitors: *Valpy, Chaplin & Peckham; G. A. Shoppee.*

T. F. M.

KAY, J.
1886
Jan. 14.

ANGLO-SWISS CONDENSED MILK COMPANY *v.* METCALF.

In re METCALF'S TRADE-MARK.

[1885. A. 1732.]

Trade-marks, Registration of—Goods of Plaintiff known by his Mark to the Public—Infringement of Plaintiffs' Mark by User by Defendant of his Mark on Goods similar in Character—Fraud—Rectification of Register.

The Plaintiffs in 1876 registered a trade-mark for condensed milk and certain other specified articles. The mark consisted of a figure representing a milk-maid or dairy-maid, and their goods became known as "*Milk-maid*" brand or "*Dairy-maid*" brand.

In 1883 the Defendant registered for "butterine and other fatty substances used as food or as ingredients in food" a mark which did not resemble the Plaintiffs' mark, but had as part of it the words "*Dairy-maid*":—

Held, that the registration of the Defendant's mark must be rectified by adding the words "other than condensed milk and" the other articles specified by the Plaintiffs. The Defendant having sold condensed milk under his trade-mark an injunction was also granted.

THE Plaintiffs, the *Anglo-Swiss Condensed Milk Company*, had since 1867 carried on business as makers and vendors of condensed milk and of other similar articles. On the 26th of August, 1876, trade-marks Nos. 8831, 8832, and 8833 were and on the 23rd of June, 1884, trade-mark No. 38,175 was registered. The trade-mark No. 8831 consisted of a full length figure of a woman with a pail on her head, held by her left hand, and another pail in her right hand. The same figure was a prominent feature in the trade-marks Nos. 8832 and 8833. The trade-mark No. 38,175 consisted of the same figure with the words "*Milk-maid Brand*" above and "Trade-mark" below it. The registration was for "condensed milk, coffee and milk, cocoa and milk, chocolate and milk, and essence of coffee." The evidence shewed that as far back as January, 1881, the Plaintiffs' condensed milks were most commonly called and ordered by purchasers as "*Milk-maid*," or *Milk-maid Brand*," but that they were also very frequently called or ordered as "*Dairy-maid Milk*" or "*Dairy-maid*

Brand," and the evidence also shewed that during the year prior to December, 1885, the Plaintiffs sold upwards of three million tins of their condensed milks.

In November, 1882, the Plaintiffs for the first time discovered that the Defendant *Metcalf*, who carried on business at *Liverpool* under the style of *J. J. Metcalf & Co.*, was advertising in the *Grocer's Diary* thus: "*Milk-maid. J. J. Metcalf & Co.*, sole importers of the celebrated '*Milk-maid*' brand of butterine," and thereupon the Plaintiffs' manager wrote to the Defendant on the 29th of that month to the effect that the "*Milk-maid*" brand was their property, and "as you are doubtless aware, the Act extends our right to all articles in the class of provisions. We expect that you will at once withdraw all advertisements, and cease to use the words '*Milk-maid*' as a brand, or in any other form whatever." The reply contained an assurance to discontinue using the "*Milk-maid*" brand in any shape or way, and, relying on the Defendant's promise, the Plaintiffs said they would take no further steps in the matter. But on the 22nd of December, 1882, the Defendant applied for, and on the 14th of February, 1883, obtained registration of a stencilled half-length figure of a woman with a pail under her right arm in conjunction with the words "*Dairy-maid*" on the sides of the figure, as a trade-mark for "butterine and other fatty substances used as food or as ingredients in food." In September, 1883, the Plaintiffs for the first time discovered what the Defendant had done, and their solicitors wrote to him, calling his attention to the fact that as to the trade-mark 29,871, consisting of a drawing of a milk-maid with the words "*Dairy-maid*," the Plaintiffs were the registered owners of the well-known trade-mark of "*Milk-maid*," and that he had in February, 1883, due notice that the Plaintiffs objected to his applying to register his trade-mark, and they added that their instructions were to apply to remove his mark from the register unless he would withdraw it. And in a letter dated the 24th of September, 1883, they asked the Defendant to confine his mark to butterine. After a correspondence the Defendant said that he was prepared to confine his brand to butter, butterine, and eggs, and was also prepared to give any reasonable guarantee not to use it for any other kind of goods. In October, 1883, the Defen-

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dant, in reply to a request, said that he was willing to allow the Plaintiffs to register the "*Dairy-maid*" for food substances other than butter, butterine, and eggs, provided that the Plaintiffs would allow him to register the "*Milk-maid*" brand to use on butter, butterine, and eggs only. On the 30th of October, 1883, the Plaintiffs declined to consent to the Defendant's registering "*Milk-maid*" as proposed, but agreed to his registering "*Dairy-maid*" for butter, butterine, and eggs. In April, 1884, the Plaintiffs said that before applying to rectify the register they would wait and see whether the use by the Defendant of the trade-mark No. 29,871 led to his goods being passed off or attempted to be passed off as the goods of the Plaintiffs, and that if the user of the trade-mark 29,871 should have any such effect, a motion would be made to rectify at once.

At the end of 1885 the Plaintiffs discovered that the Defendant was offering for sale and selling at his place of business at *Liverpool* condensed milk in tins similar to those of the Plaintiffs, which had pasted on them the figure of a half-length dairy-maid or milk-maid in conjunction with the words "*Dairy-maid*" and "Registered Trade-mark." The condensed milk was stated to be that of the *Anglo-Danish Milk Company*, in which company the Defendant admitted that he was largely interested. The Plaintiffs contended that the Defendant was trading under the style of the *Anglo-Danish Milk Company*, and that there was no company, except himself.

The Plaintiffs' action [1885 A. 1732] was brought against the Defendant to prevent him from infringing their registered trade-marks, and motions were now made on their behalf: first, in the action, for an injunction to restrain the Defendant, his agents, &c., from selling or passing off or attempting to sell or pass off by label, trade-mark, circular, advertisement, or otherwise, any condensed milk not of the manufacture of the Plaintiffs; and secondly, in the matter of the *Trade-marks Acts*, for an order that the register of trade-marks might be rectified by limiting the description of goods for which the trade-mark No. 29,871 should be deemed to be registered to butterine and other fatty substances used as food, or as ingredients in food, except condensed milk, coffee and milk, cocoa and milk, chocolate and milk, and essence of coffee.

Hastings, Q.C., and *John Cutler*, for the Plaintiffs, after stating the facts and referring to the cases of *Edwards* v. *Dennis* (1) and *Re Barker's Trade-mark* (2), submitted that the Plaintiffs were entitled to the orders which they asked for.

Chadwyck Healey, for the Defendant, contended that he was entitled to do what he had done, his trade-mark being distinctly different, and the words "*Dairy-maid*" not having been part of the Plaintiffs' mark.

KAY, J. (after observing that the facts were a little peculiar, and stating them, continued):—

The Plaintiffs' registered trade-mark is obviously intended for a milk-maid or a dairy-maid, and though it is quite true that neither the words "*Milk-maid*" nor "*Dairy-maid*" were before the 23rd of June, 1884, any part of the Plaintiffs' trade-mark, yet those words were names which the public, looking at the figure on the labels, had affixed to the particular kind of milk which the Plaintiffs sold, and it grew into a habit with numbers of persons to apply for and order their condensed milk under these names. The Defendant has done all that he could do to justify these proceedings. He is a tradesman carrying on a similar kind of business, and has not in his affidavits denied that at the time when he registered his trade-mark he was aware of the fact that the Anglo-Swiss condensed milk was being inquired for and sold under the names of the "*Milk-maid*" and "*Dairy-maid*" brand. I must, therefore, take it that he was perfectly well aware of that fact. Indeed, he had it distinctly called to his attention in some of the letters which have been put in evidence and read, that the Plaintiffs claimed the milk-maid as their brand. Knowing, therefore, what the Plaintiffs claimed as their brand for condensed milk, and that the public had given orders and largely inquired for it under the name of the "*Dairy-maid Brand*," what did the Defendant do? Why, on the 2nd of December, 1882, he applied for, and on the 14th of February, 1883, obtained, the registration of a trade-mark—the stencilled half-length figure of a woman—with the words

(1) 30 Ch. D. 454. (2) 53 L. T. (N.S.) 23.

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"*Dairy-maid*" on the sides. It is true that the figure in no way resembles that of the Plaintiffs' trade-mark, and the Defendant has added the words "*Dairy-maid*," which were not on the Plaintiffs' trade-mark; and he has registered his trade-mark (29,871) for butterine and other fatty substances used as food or as ingredients in food. These facts were not discovered till September, 1883, and then a correspondence ensued between the parties. [His Lordship read the letters, which are shortly stated above, and continued:—] There had been in the meantime a negotiation for the purchase by the Plaintiffs of all the rights of the Defendant in the trade-mark which he had registered, and which up to that time he had never used for anything except for butter, butterine, and eggs.

Certainly he had never used it for condensed milk or for any of the substances described by the Plaintiffs in the registration of their trade-mark. But some time afterwards the Defendant began to use his trade-mark for condensed milk. I have before me one of the tins of milk bought of himself, and for the sale of which he accepts the entire responsibility, which has pasted upon it a label with the words "*The Anglo-Danish Condensed Milk Company Dairy-maid Condensed Milk*," and then there is a figure somewhat resembling the stencilled picture, but very much more distinct, of a dairy-maid with a pail under her right arm. Now is that or is it not calculated to deceive the public, who for years past have been accustomed to inquire for the condensed milk made by the Plaintiffs and sold by them under the name of "*Milk-maid*" or "*Dairy-maid*" brand? The Defendant, with full knowledge of all that, chose to put upon his tins of condensed milk, which are exactly the same size, shape, and form as the Plaintiffs' tins of condensed milk, labels, with the words which I have just read. It is very likely that a tradesman who buys the Defendant's tins of milk to sell again may know perfectly well the distinction between them and the Plaintiffs', but are they or are they not calculated to deceive people who know the Plaintiffs' condensed milk by the terms "*Milk-maid*" or "*Dairy-maid*" brand, and who go to retail shops and inquire for it in that way? I have not the faintest doubt about it. It is not only calculated to deceive, but there seems to me to be no reason whatever why

the Defendant should have done that which he has done except with the design and intention of committing a direct fraud upon the Plaintiffs, and to enable him to acquire some of their custom and to pass off his goods as and for those of the Plaintiffs. To my mind the evidence proves that there was a direct intention to commit a fraud.

In that state of things ought I to allow the register to be continued in the shape in which it is? It seems to me to be clear that the duty of the Court is to prevent it, and therefore I think that upon the motion to rectify the register the proper order will be that the Defendant's registration must be confined to goods other than condensed milk, coffee and milk, cocoa and milk, chocolate and milk, and essence of coffee.

Then as to the motion for an injunction. The Plaintiffs have, besides the motion to rectify the register, brought an action against the Defendant to restrain him by injunction from this most improper, and, as I hold, fraudulent attempt to invade their rights, and that being so, I have no hesitation in granting an injunction. The form of it should be consistent with the order to rectify the register, which I have made, and it should restrain the Defendant from using his trade-mark upon condensed milk, coffee and milk, cocoa and milk, chocolate and milk, and essence of coffee, or any of those substances. The injunction will be until the trial of the action or further order, but, as regards the trade-mark motion, that is disposed of, and the Defendant must pay the costs of it. The other costs will be costs in the action.

Solicitors: *McKenna & Co.; G. Thatcher,* agent for *Knowles & Symonds, Liverpool.*

T. F. M.

KAY, J.
1886
Jan. 14, 30.

In re BACON'S WILL.
CAMP *v.* COE.

[1885 B. 1983.]

Will on Printed Form—Blanks left by Testatrix—Gift "unto to and for own use and benefit absolutely"—Appointment of Executor—No Next of Kin—Presumption—Parol Evidence—Claim by Crown—Admissibility of Evidence of Intention of Testatrix—Executor entitled absolutely.

Testatrix, who made her will on a printed form, after giving certain legacies, gave all her estate real and personal "unto to and for own use and benefit absolutely," and then appointed *C. W. C.* to pay all her debts, &c., and to be executor of her will. The Chief Clerk certified that the testatrix was illegitimate, and that she left no issue or next of kin. The Crown and the executor claimed the residue, and the executor tendered evidence to prove that the intention of the testatrix was, that he should take the residue, if any, for his own benefit:—

Held, that, under the peculiar circumstances, parol evidence was admissible to rebut the presumption against the executor arising from the blanks in the will, and that the executor, subject to the payment of costs, was entitled for his own benefit to what should remain.

MARY BACON, who died in March, 1881, by her will made in September, 1876, on a printed form in which she left blanks, after directing that all her debts and funeral and testamentary expenses should be paid by her executor, said: "I give, devise, and bequeath all (then came a blank) the following sums to the persons named, that is to say." Legacies of small amount were then given to four persons, of whom the Defendant was one. The testatrix then said: "household furniture to be sold for keeping grave in repair, to be under the care of the executor," (and then came another blank).

The testatrix then gave specific articles in her house "and also all and every sum and sums of money which may be found in my house or be about my person or due to me at the time of my decease, and also all my stocks, funds and securities for money, book debts, money on bonds, bills, notes, or other securities, and all and every other my estate and effects whatsoever and wheresoever, both real and personal, whether in possession or reversion,

remainder, or expectancy, unto to and for own use and benefit absolutely, and I nominate, constitute, and appoint *Charles William Camp* of No. 31, *Reynold Road, Vicarage Lane, West Ham, Essex*, to pay all my debts, funeral expenses to be executor of this my will." After revoking all former wills the testatrix said: "I declare this to be my last will and testament, In virtue whereof, I, the said have to this my last will and testament set my hand the day of in the year of our Lord one thousand eight hundred and seventy-six."

The will was duly proved by the executor. An originating summons was in April, 1885, taken out by the executor for administration, and in May, 1885, the Court made a declaration that upon the true construction of the will the residuary personal estate passed to the executor on trust for the next of kin (if any) of the testatrix, and that the gift for keeping the grave in repair failed; and ordered an inquiry whether the testatrix left any next of kin at the time of her death, and if so, consequential inquiries.

The Defendant, *Sarah Coe*, and other persons, alleged that they were next of kin, but the Chief Clerk in August, 1885, certified that the testatrix did not leave any next of kin according to the *Statutes of Distribution*, and that she died without issue, and was illegitimate. The residue of the estate, after deducting the legacies, debts, and expenses, was about £200. In November, 1885, the executor took out a summons, asking for a declaration that as the testatrix died without issue and was illegitimate, he was entitled to the fund, and that he might, after payment of the costs, retain the balance for his own use.

In support of the summons affidavits were filed which conclusively shewed an intention on the part of the testatrix that the executor should take the residue (if any) for his own benefit.

Cave, for the Plaintiff, the executor, submitted the presumption was that there was an intention on the part of the testatrix that he should take the residue, and that, if necessary to rebut a presumption that she intended to give it to someone else, evidence was admissible of her intention, and the affidavits which

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had been filed would sufficiently prove it, that the executor was to take it for his own benefit.

[He referred to the cases of *In re Knowles* (1); *Clennell* v. *Lewthwaite* (2), and *Lynn* v. *Beaver* (3).]

Stirling, for the Crown, admitted that it would be his duty to shew that the executor was not to take the residue beneficially: and contended that that was sufficiently made out by the many blanks in the will. There was an indication of intention in the testatrix's mind to give the residue to some unknown person, and it was plain on the face of the will that the executor was to be a trustee only. That being so, parol evidence was not admissible. The Court would not admit parol evidence to contradict a written document: *Williams* on Executors (4). The cases which had been cited were where legacies had been given to executors, and there it was contended that they could not take the whole where they had been given a part of the estate: but that was a mere presumption, and had been held to be capable of being rebutted by parol evidence.

[He referred to *Middleton* v. *Spicer* (5); *Bishop of Cloyne* v. *Young* (6); *Lord North and Guildford* v. *Purdon* (7); *Dawson* v. *Clark* (8), and *Lynn* v. *Beaver* (9).]

A. àB. Terrell, for the Defendant.

Cave, in reply.

Jan. 30. KAY, J.:—

The will in this case was made upon a printed form, and after certain legacies it contained a gift of all the property of the testatrix, real and personal, "unto to and for own use and benefit absolutely," and the appointment of *Charles William Camp* "to pay all my debts and funeral expenses to be executor of this my will."

(1) 28 W. R. 975.
(2) 2 Ves. 465.
(3) T. & R. 63.
(4) 8th Ed. p. 1487.
(5) 1 Bro. C. C. 201.
(6) 2 Ves. Sen. 91.
(7) Ibid. 495.
(8) 15 Ves. 409, 414.
(9) T. & R. 66–68.

The testatrix had no next of kin, and the question is raised whether the Crown is entitled to or the executor can retain the residue beneficially.

This it was admitted must be determined by the law as it existed before the statute 1 Will. 4, c. 40, which only applies as between an executor and next of kin: *Hawkins* v. *Hawkins* (1); *Taylor* v. *Haygarth* (2); *In re Knowles* (3).

Parol evidence of the intention of the testatrix in the present cases has been tendered which, if receivable, is conclusive in favour of the executor. But, it was argued on the part of the Crown that although such evidence would be receivable if a presumption were raised against the executor by reason of a legacy to him, yet that such evidence was not admissible in this case because it appeared on the face of the will that there was an intention to give the property to some one else whom the testatrix omitted to name. In short, it was argued that in the one case there was a presumption against the executor which might be rebutted, but in the other case it was not a presumption, and, therefore, evidence was inadmissible. Lord *Alvanley's* words in *Clennell* v. *Lewthwaite* (4) were these: "The rule is clearly established, that the executor shall have the residue, unless there is a strong and violent presumption to the contrary; that a legacy to him affords that presumption: but that it is not so strong to take away his legal right, as to deprive him of the opportunity of proving, by parol evidence, that the testator did intend that he should have it."

Lord *Eldon*, in *Langham* v. *Sanford* (5), adopted those words, and stated "that parol evidence is not admissible, in cases where it is conclusively apparent on the will itself, that the executor was meant to be a trustee only." In the same case Lord *Eldon* referred to *Bishop of Cloyne* v. *Young* (6) in these terms (7): "The testator had appointed executors, and in the same paper says, 'I give and bequeath the remainder of my estate, real and personal—' and there ends; and Lord *Hardwicke* was of opinion

(1) 7 Sim. 173.
(2) 14 Sim. 8.
(3) 28 W. R. 975.
(4) 2 Ves. 474.
(5) 2 Mer. 6, 17.
(6) 2 Ves. Sen. 91.
(7) 2 Mer. 23.

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that he had thereby manifested a purpose that his executors should not take the residue, and they were excluded, not because he had given them legacies, but because he had manifested an inchoate intention to appoint a residuary legatee."

It seems from the report of that case (1), that the defendants the executors did adduce evidence to shew there was no resulting trust, and the plaintiffs, the next of kin, were allowed to read evidence to take off the credit of that, not to prove that the testator intended to give it to them, but to answer the other, upon which it was stated that the evidence was waived.

In *Lynn* v. *Beaver* (2), Lord *Eldon* said: "There is no doubt that where upon the face of a will it appears that the executor was intended to take the office only, where the testator has raised a trust which fails of being carried into effect, or where he has clearly intended to create a particular trust, which he has failed in doing, the next of kin will take as against the executor. On the other hand it is equally clear, that if the case be a case of a mere legacy given to an executor, where the presumption of law is to be acted upon that the testator could not mean to give all and part, a presumption, which, whether reasonable or not, the Court is bound to act upon, as the doctrine has been so long laid down, the executor may rebut the presumption by parol evidence."

I have examined all the cases I can find on the subject. They are numerous, but there is none that touches the point so nearly as the *Bishop of Cloyne* v. *Young* (3).

The text-books do not throw much light upon the question. In *Williams* on Executors (4) the *Bishop of Cloyne* v. *Young* is referred to as an authority for the proposition that when parol evidence is admissible on behalf of the executors such evidence may then be opposed by similar evidence on behalf of the next of kin. In *Jarman* on Wills (5) the admission of parol evidence in support of the claim of the executors is stated to be on the same principle as its admission for the purpose of rebutting a resulting trust.

This case seems to me somewhat stronger in favour of the

(1) 2 Ves. Sen. 95.
(2) T. & R. 68.
(3) 2 Ves. Sen. 91.
(4) 6th Ed. p. 1370.
(5) 4th Ed. vol. i. p. 416.

executor than the *Bishop of Cloyne* v. *Young* (1), because here the blanks left by the testatrix were on a printed form, and it is quite conceivable that she might have left them purposely in the belief that the effect of doing so would be sufficient to entitle the executor to the residue. The effect of the blanks in this will cannot be greater than to raise a presumption against the executor of a resulting trust for the next of kin. If the personal property had been given to him in trust, but no trust declared, that would be a sufficient expression of an intention that the office only of executor was intended to be given him. But this case is different, and under the peculiar circumstances of the will, I think I am bound to give the executor the benefit of the doubt which I cannot help feeling, and admitting the parol evidence to hold that, subject to the payment of the costs, he is entitled for his own benefit to what shall remain of the testatrix's personal property.

Solicitors: *R. S. Gregson; Sedgwick; Hare & Co.*

(1) 2 Ves. Sen. 91.

T. F. M.

CHITTY, J.
1886
Jan. 14, 26.

In re LORD CHESHAM.
CAVENDISH *v.* DACRE.

[1885 C. 2527.]

Heirlooms—Bequest of—Tenant for Life—Legatees—Compensation—Election.

A testator, who died in 1882, by his will dated in 1878, gave certain chattels upon trust for sale, for the benefit of his two younger sons, and the residue of his estate to his eldest son, *C.*

The chattels so bequeathed by the will were, in fact, heirlooms settled by a deed dated in 1877, upon trust to go and be held with a certain mansion-house, of which *C.* was tenant for life:—

Held, upon the questions whether *C.* having elected to take under the will, was or was not put to his election between the benefits given to him by the will and the chattels which were bequeathed by the same will, and whether he ought not to make compensation to his younger brothers, that he was not bound to make any compensation out of his legacy to his younger brothers; that he had no interest in the chattels apart from the mansion-house, which he could make over for their benefit, and that no case of election arose.

The engrafted doctrine of compensation does not apply to the case of a person electing to take under the instrument which gives rise to the election.

Wilson v. *Lord Townsend* (1) discussed and not followed.

Adjourned summons.

The late Earl of *Burlington*, by his will, dated in 1829, devised all his estates in the counties of *Buckingham*, which included a mansion-house at *Latimer*, *Hertford*, *Huntingdon*, and *Lancaster*, to trustees upon trust for his son *Charles Compton Cavendish*, afterwards first Baron *Chesham*, for life, remainder to his eldest son *William George*, afterwards second Baron *Chesham*, for life, remainder to the first and every other son successively of the said *William George*, second Baron *Chesham*, in tail male. He also devised his mansion-house, called *Burlington House*, to his wife for life, and after her death to trustees upon the same trusts as those before declared concerning his landed estates, and he bequeathed to his trustees all the plate, china, books, household effects, and furniture in and about *Burlington House* at the time

(1) 2 Ves. 693.

of his decease, upon trust to permit the same to be held and enjoyed with the mansion-house.

The Earl of *Burlington* died in 1834, and *Charles Compton*, first Baron *Chesham*, died in 1863.

By a disentailing deed dated the 15th of November, 1872, all the real estates devised by the will of the Earl of *Burlington* were disentailed and resettled to such uses as *William George*, second Baron *Chesham*, and *Charles Compton* (now third Baron *Chesham*), should jointly appoint; and the plate, china, books, household effects, and furniture, which originally belonged to *Burlington House*, were assigned to trustees upon trust to permit the same to be enjoyed with the mansion-house at *Latimer*, in the county of *Bucks*.

By a settlement dated the 12th of November, 1877, being the settlement made on the marriage of *Charles Compton*, the present Baron *Chesham*, he and his father, the second Baron *Chesham*, appointed the real estates comprised in the disentailing deed of the 15th of November, 1872, under the joint power of appointment contained therein, to uses under which the second Baron *Chesham* became first tenant for life, and the present Baron *Chesham* became tenant for life in remainder expectant on the death of his father, and also appointed all the plate, books, household effects, and furniture bequeathed by the will of the Earl of *Burlington* upon trust to permit the same to be enjoyed with *Latimer* aforesaid.

Burlington House having been sold, all the contents which were settled by the will of the late Earl of *Burlington* as heirlooms were removed partly to the house in *Grosvenor Square*, belonging to the trustees of the will of the Earl of *Burlington*, and partly to *Latimer* aforesaid. The house in *Grosvenor Square* was sold in 1864, and thereupon the greater part of the heirlooms were removed to No. 17, *Grosvenor Street* (a leasehold house, then and at his death belonging to the second Baron *Chesham*), and remained there until his death.

William George, second Baron *Chesham*, by his will, dated the 7th of January, 1878, bequeathed the leasehold house, No. 17, *Grosvenor Street*, and the furniture, plate, linen, china, and other household effects therein, or belonging thereto, to the Plaintiffs upon trust to permit and suffer his wife to reside in and occupy

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the same leasehold house, and to use the furniture and leasehold effects for her life, and after her decease upon trust for sale, for the benefit of his younger sons, and the testator gave all the residue of his real and personal estate to *Charles Compton* (the present Baron *Chesham*).

The value of the residue amounted to about £30,000.

The testator died in 1882, and his widow died in 1884, and the house in *Grosvenor Street* was soon afterwards sold.

Nearly the whole of the furniture and contents of the house, No. 17, *Grosvenor Street*, at the date of the will and death of the second Baron *Chesham*, originally belonged to the late Earl of *Burlington*, and were comprised in the bequest of the furniture at *Burlington House* in his will, and were heirlooms, and were not the private property of the second Baron *Chesham*.

Part of the heirlooms were sold by the trustees, who had been duly appointed for the purposes of the *Settled Land Act* to enable the heirlooms to be sold. A portion of the heirlooms were removed to *Latimer*.

This summons was taken out by the Plaintiffs, the trustees of the will of the second Baron *Chesham*, and the questions were, whether *Charles Compton*, third Baron *Chesham*, was or was not put to his election between the benefits given to him by the will of the second Baron, and the furniture, plate, linen, china, and household effects in the house in *Grosvenor Street* bequeathed by the same will, and whether he was not bound to make compensation to his younger brothers.

Farwell, for the summons:—

The cases of *Smith* v. *Lucas* (1), *In re Vardon's Trusts* (2), and *In re Wheatley* (3), decide that if the property out of which compensation would have to be made is made inalienable by the instrument supposed to raise the election, there is no election; there are two reasons for this: first, because the testator or settlor has by the instrument itself shewn that there is to be no election; and secondly, because the equity is one of compensation, and there is nothing out of which to give compensation.

(1) 18 Ch. D. 531. (2) 28 Ch. D. 124 (since reversed, 31 Ch. D. 275).
(3) 27 Ch. D. 606.

But the same reasoning does not apply to the present case, where the property of the residuary legatee which is given away by the testator is inalienable by such legatee: *Wilson* v. *Lord Townsend* (1); *Middleton* v. *Windross* (2); *Williams* v. *Mayne* (3).

As Lord *Eldon* said in *Ker* v. *Wauchope* (4), the equity of compensation is engrafted on the doctrine of election. That equity is for the benefit of the disappointed legatee and to effectuate the testator's intentions.

In this case the testator meant his younger sons to have the heirlooms, and if Lord *Chesham* cannot give them up, he must do the best he can and make compensation. The equity is not to punish the recalcitrant but to compensate the disappointed.

In any case Lord *Chesham* should be charged a rent.

Lewin, for Lord *Chesham*:—

As Lord *Chesham*, if required to do so, will elect to take under the will, he must confirm the will so far as he can, and must give up to the disappointed legatees any beneficial interest that he can dispose of in the chattels. But he has no interest in the chattels that he can make over to them, or from which they can derive any benefit apart from *Latimer*. No assignment by Lord *Chesham* of his interest in the chattels could be framed which would not be a breach of trust.

As Lord *Chesham* has no interest in the chattels which he can make over for the benefit of his younger brothers, no case of election really arises, and he is not bound to make any compensation to them out of his legacy.

Wilson v. *Lord Townsend* is the only authority that can be produced which even seems to support the proposition that compensation ought to be decreed, but even if the *dictum* in that case is correct, the election there was to take against the will.

[He referred to *Howells* v. *Jenkins* (5) and *Grissell* v. *Swinhoe* (6).]

(1) 2 Ves. 693.
(2) Law Rep. 16 Eq. 212.
(3) I. R. 1 Eq. 519.
(4) 1 Bli. 1, 25.
(5) 2 J. & H. 706.
(6) Law Rep. 7 Eq. 291.

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Farwell, in reply:—

The argument on the other side assumes that it is the same thing to say that Lord *Chesham* has not got the heirlooms, and to say that he cannot dispose of them; but that is not so. The inquiry is, has he any beneficial interest in them? if he has, then to the extent of that interest he must make compensation.

CHITTY, J.:—

The will of the late Lord *Chesham* purports to bequeath the furniture, plate, linen, china, and other household effects in or belonging to the leasehold house, No. 17, *Grosvenor Street*, which was his own property. The chattels which were there at the time of his death consisted of chattels belonging to him and of part of the settled chattels. When this matter was before me in Chambers, I intimated an opinion that the terms of this bequest were sufficient to include such of the settled chattels as were in the house at the time of the testator's death. With that opinion counsel for Lord *Chesham* has expressed himself satisfied, and it is unnecessary for me to say anything further on this point.

The will then purports to bequeath part of the settled chattels upon trust for sale for the benefit of testator's younger children, and gives to the present Lord *Chesham*, the eldest son, benefits far exceeding in value the interest to which in any view of the case he is entitled in the settled chattels. It is necessary to ascertain what was the nature of that interest at the testator's death.

At the date of the will and the death of the late Lord *Chesham*, the chattels were bound by the settlement of 1877. The legal property in the chattels was vested in the trustees of the settlement upon trust to permit them to be used, held and enjoyed with the mansion-house called *Latimer* by the person or persons who for the time being should be entitled to the mansion-house under the limitations of the settlement. For the younger sons it is argued that the effect of this trust was to make Lord *Chesham* (who is tenant for life of the mansion) tenant for life of the chattels without restriction as to the place of enjoyment. So

to read the trust would be to strike out the words "with the mansion-house." These words cannot be treated as mere surplusage; they are an essential part of the trust; and Lord *Chesham* is only entitled to the enjoyment of the chattels with the house. To hold otherwise would be to destroy an essential part of the trust. The chattels are in effect annexed to the house, and cannot be removed from it (except for a temporary purpose, as repairs or the like) without a breach of trust.

It is contended, however, that when the surrounding circumstances as they existed at the date of the settlement are taken into consideration, it could not have been the intention of the settlors to annex the chattels to the house. It is not contended that the house was not large enough to hold all the chattels including the furniture; in fact the plate and china and some other articles, constituting apparently the more valuable portion of the chattels, are there now. But it is said that *Latimer House* was at the date of the settlement sufficiently supplied with other furniture fit for such a house. The result on the facts, as admitted at the Bar, appears to be that to place all the settled furniture in the house in addition to that which was there at the date of the settlement and is there now would be to cause inconvenience to the occupiers of the house. That circumstance, however, does not make any difference in the construction or effect of the trust. The settlement settled the house itself as well as the chattels, and the settlors must be deemed to have been aware that their settlement of the chattels might cause some inconvenience to the tenant for life of the house. The express terms of the trust cannot be controlled by any inference drawn from inconvenience.

It follows, then, that Lord *Chesham* had no power at the testator's death to make any assignment or disposition of the chattels so as to confer on his assign the right to enjoy the chattels apart from the mansion.

As, then, the value of the benefits he takes under the will far exceeds his interest in the settled chattels, it is obviously his interest to take under and not against the will; and by his counsel at the Bar he states that if he is bound to elect at all he elects to take under the will: and that he is ready to do all in his power to confirm the attempted disposition by the will of the

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settled chattels. The will does not purport to dispose of *Latimer House;* and no possible case of election arises in reference to the mansion itself.

The questions then are, first, whether Lord *Chesham* is put to his election; and secondly, if he is, whether if he elects (as he does) to take under the will he is bound to make compensation to his younger brothers out of the residue given to him to the extent of the value of his interest in such of the settled chattels as the will purports to bequeath.

I will deal with these questions in the first instance apart from the *Settled Land Act.*

It is clear that if he takes under the will he must confirm the will so far as he can, and must give up to the disappointed legatees any beneficial interest that he can dispose of in the chattels. But he has in effect no interest in the chattels which he can make over to them, or from which they can derive any benefit, apart from the mansion-house; and as to his life estate in the mansion-house he is free from all claim, direct or indirect, on the part of his brothers.

In effect it is the paramount title of the trustees, who are not affected by any question of election, rather than the restricted interest of Lord *Chesham,* which prevents effect being given to the bequest of the chattels. A Court of Equity never decrees an act to be done which is a breach of trust, or a mere idle act which could only lead to litigation. And inasmuch as no assignment by Lord *Chesham* of his interest could be framed which would not be a breach of trust, or which could confer any benefit on his younger brothers, it would not order him to execute any assignment of the chattels for the purpose of confirming the will.

It is admitted that no authority can be produced in support of the proposition that where the election is to take under the instrument compensation has been decreed. The question, then, requires some examination of the principles on which the Courts of Equity have proceeded in working out the doctrine of election and the authorities bearing on the subject.

Mere personal incapacity arising from infancy or coverture on the part of the person put to his or her election is not sufficient to exclude the application of the doctrine. In the familiar cases of

incapacity arising from infancy or coverture, the Court (generally after a preliminary inquiry on the subject) itself makes the election for the benefit of the infant or married woman, but in all cases that I am aware of, the Court, where the election is thus made to take under the will, effectually binds the interest of the party entitled to set up a paramount title by an appropriate declaration in favour of persons taking under the instrument on which the question of election arises, with incidental directions, where necessary, for conveyance, assignment, release, or the like, adapted to the special circumstances of the case. But in the case before me Lord *Chesham* is under no personal incapacity. He cannot make an assignment because he has no assignable interest.

The principle on which the doctrine of election is based is that a man shall not be allowed to approbate and reprobate; that if he approbates he shall do all in his power to confirm the instrument which he approbates. The consequences of such a principle cannot be legitimately carried beyond the principle itself; if a man approbates, his obligation is confined to his adopting the instrument as a whole and abandoning every right inconsistent with it. In all the leading authorities the principle is stated substantially to the effect above given, and, so far as I am aware, where the election has been to take under the instrument there is no decision decreeing compensation. In *Streatfield* v. *Streatfield* (1) Lord *Talbot*, in stating the principle, said that the tacit condition was that the devisee should not disturb the disposition made by the will.

In *Ker* v. *Wauchope* (2) Lord *Eldon* confines the engrafted doctrine of compensation to the case of taking against the instrument, and describes it as arising from the conduct of the person electing so to take. He says (3): "In our Courts we have engrafted upon this primary doctrine of election, the equity as it may be termed of compensation. Suppose a testator gives his estate to *A.*, and directs that the estate of *A.*, or any part of it, should be given to *B.* If the devisee will not comply with the provision of the will, the Courts of Equity hold that another condition

(1) Cas. t. Tal. 176. (2) 1 Bli. 1.

(3) 1 Bli. 25.

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is to be implied, as arising out of the will, and the conduct of the devisee; that inasmuch as the testator meant that his heir-at-law should not take his estate which he gives *A.*, in consideration of his giving his estate to *B.*; if *A.* refuses to comply with the will, *B.* shall be compensated by taking the property, or the value of the property, which the testator meant for him, out of the estate devised, though he cannot have it out of the estate intended for him."

In *Wollaston* v. *King* (1) Lord Justice *James*, then Vice-Chancellor, after stating that he had endeavoured to extract from the cases a principle, adopted the rule laid down by the Master of the Rolls in *Whistler* v. *Webster* (2) in the following general terms, viz.: "That no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to everything contained in it whereby any disposition is made shewing an intention that such a thing shall take place."

In *Cooper* v. *Cooper* (3) Lord *Hatherley* says (4): "The main principle was never disputed, that there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit; and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect."

In *Codrington* v. *Codrington* (5) Lord *Cairns* states the law thus (6): "By the well-settled doctrine which is termed in the Scotch law the doctrine of 'approbate' and 'reprobate,' and in our Courts more commonly the doctrine of 'election,' where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them."

(1) Law Rep. 8 Eq. 165, 174.
(2) 2 Ves. 367.
(3) Law Rep. 7 H. L. 53.
(4) Law Rep. 7 H. L. 69.
(5) Ibid. 854.
(6) Ibid. 861.

In none of these authorities can any trace be found of an attempt to apply the engrafted doctrine of compensation to the case of a person electing to take under the instrument which gives rise to the election. Nor is there any suggestion to that effect in Mr. *Swanston's* learned note to *Gretton* v. *Haward* (1); on the contrary, the obligation of the person electing to take under the instrument appears to be confined to confirming the instrument so far as he is able.

The case of *Wilson* v. *Lord Townsend* (2), relied on by counsel for the younger sons, is no authority for the propositions which he founded upon it. In that case the election was to take against the instrument, and the bill was dismissed, the observations relied on are at the utmost mere *dicta;* and they are not even *dicta* in favour of compensation where the election is to take under the instrument, but of forfeiture. At the time when that decision was given, it had not been finally decided that election to take against the instrument did not involve forfeiture, but merely gave a right to compensation out of the interest given by the instrument, the *dictum* relied on is: "If the party is under restraint, and cannot accomplish that" (viz., give up the specific thing to which he has a paramount title), "it is the misfortune of the party; but the consequence is, that while he continues in that situation, his claim must be barred." This apparently points to personal incapacity and certainly involves forfeiture. The *dictum* cannot be supported as it stands.

After the conclusion of the argument Mr. *Farwell* referred me to the case of *Williams* v. *Mayne* (3), and Mr. *Lewin* sent me some observations on it. In that case a legacy was given to a married woman for her separate use for life without any restraint on anticipation by a will which purported to bequeath to another person a portion of a fund of personalty in which under a settlement the married woman had a reversionary interest. It was held that during the life of the tenant for life of this fund the married woman could not elect, and that her legacy must be impounded until she could elect. That case is distinguishable from the

(1) 1 Sw. 409, 433.
(2) 2 Ves. 693, 696.
(3) I. R. 1 Eq. 519.

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present. It was admitted there that a case of election arose, and that the married woman was bound to give up her interest in the fund if she accepted the legacy; and it was considered that she would be capable of binding her interest in the fund when it fell into possession. The question then resolved itself into this, whether she was bound to elect while her interest under the settlement was reversionary, or whether the time for electing ought not to be postponed until she could bind her interest under the settlement. The decision itself has little or no direct bearing on the case before me. There is no ground in this case for saying that the time for electing ought to be postponed, or that any further event contemplated by the settlement can enlarge the interest of Lord *Chesham* in the chattels. In giving his judgment in that case the Irish Master of the Rolls referred to the hardship upon the married woman, and it is at least questionable whether any equitable doctrine ought to be so applied or worked out as to create what in the opinion of the Judge is a hardship.

The result is, that this attempt to engraft a new doctrine of compensation on the doctrine of election fails. I hold that Lord *Chesham* is not bound in any view of the case to make any compensation out of the residue to his younger brothers. But I go further. Inasmuch as Lord *Chesham* has no interest in the chattels which he can make over for the benefit of his younger brothers, it appears to me that no case of election really arises. Election means free choice. He cannot be compelled directly or indirectly to take under the settlement and against the will. But when he takes under the will there is nothing for him to give up, for there is nothing which he can give up. It seems to me to be absurd to say that he is put to his election merely for the purpose of making a deduction from his residuary legacy.

The point raised as to the *Settled Land Act*, and the order giving Lord *Chesham* liberty to sell some of the chattels, and the sale of some of the chattels comprised in the order, is readily disposed of on a broad principle. The equities of the parties must be determined according to the state of circumstances as they existed at the testator's death, and the *Settled Land Act* had not then been passed. The acquisition by Lord *Chesham* after the

testator's death of any greater or different interest in the chattels, whether under an Act of Parliament or otherwise, gave rise to no new or additional equities against him. If a testator purports to devise another man's lands to a person who takes no benefit under the will and bequeaths a legacy out of his own estate, and the legatee after the testator's death acquires a title to the lands, by purchase or otherwise, the legatee is not put to his election.

Solicitors: *Currey, Holland, & Currey; Spencer Whitehead,* agent for *Milward & Co., Birmingham.*

G. M.

PEARSON, J.

1885

Nov. 13, 16.

HAIGH *v.* HAIGH.

[1884 H. 444.]

Practice—Rules of Supreme Court, 1883, *Order* XXVII., *r.* 15—*Setting aside Judgment.*

The Defendant to an action disobeyed an order to produce documents for inspection; her defence was struck out, and judgment given against her in default of a defence. There was evidence that her solicitor had explained to her the effect of the order for production and the consequence of disobeying it. The Court refused to set aside the judgment on any terms.

THE Plaintiff was *John Haigh*, the administrator of his mother, *Martha Haigh*, who died in May, 1884. The Defendant was *Mary Haigh*, one of the five next of kin of *Martha Haigh*. The Plaintiff, by his statement of claim, alleged that two sums of £1000 and £650, which at the time of the death of *Martha Haigh* stood in the joint names of *Martha Haigh* and the Defendant in the *East Morley and Bradford Savings Bank*, were the sole property in equity of *Martha Haigh*, and belonged to him as administrator, and he claimed that the Defendant might be ordered to pay or transfer those sums with interest to him as executor.

The Defendant delivered a statement of defence on the 18th of December, 1884, by which she denied that the two sums of £1000 and £650 were part of the personal estate of *Martha Haigh*, and alleged that they had become her own sole property by survivorship.

On the 1st of April, 1885, an order was made on the Defendant to produce the deposit books referred to by her in an affidavit as to documents. The documents were not produced, and on the 27th of April, 1885, an order was made striking out the statement of defence; and on the 16th of May, 1885, judgment was given against the Defendant in default of a defence. On the 9th of July, 1885, an order was made on the Defendant to bring in an account; and on the 5th of August, 1885, an order was made on her to transfer the sum of £1000 and £650 with interest to the Plaintiff.

This was a motion on the part of the Defendant that the judgment might be set aside, and that the time for production of documents might be extended, or that the time for appealing against the order for production of documents might be extended. Notice of motion was given on the 19th of October, 1885.

The application was supported by an affidavit by the Defendant, from which the following is an extract:—

"I employed Mr. *J. J. Wright*, of *Bradford*, as my solicitor, but from what he said I was led to believe that I was ordered to give up the books to *Greaves*, my brother's lawyer, which I thought would be fatal to my just case. I also advised with a friend in whom I had great confidence, but who was not a lawyer, as I myself am quite ignorant of business. My said friend told me on no account to part with the books, as they were my only hold or protection, and I honestly believed him that it would be right for me to keep possession of the two deposit books which my mother had left with me, and that I should lose my just rights as the survivor if I parted with them to any person.

"In the month of March, 1885, the said Mr. *Wright* informed me that I was required to produce to the Plaintiff the said deposit books. I did not know what to do or what an order of Court meant, and finding Mr. *Wright* still asked me for the books I called at his office, and informed him that I would go up to *London* with the books and state the facts to the Court myself. He, however, informed me that such a course was useless, and that no one would hear me. He said, 'You will not be heard speak.' But for that discouragement by him I should have gone to *London* and spoken for myself and at the same time produced the books in Court, which I thought would be the proper course. Whilst I was in doubt as to what I should do there was on the 27th of April, 1885, as I have since been informed, an order made by this Honourable Court striking out my defence by reason of the non-production of such books, and that subsequently judgment was given in this action against me with all costs. The case was taken as undefended, and on the representations to the Court of my brother *John* the Plaintiff only."

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Mr. *Wright*, the Defendant's late solicitor, made an affidavit containing the following paragraphs:—

"I wrote the Defendant on the 10th of April informing her of this, and the Plaintiff threatened to take out proceedings to strike out her defence, and the following is an extract from the letter:—'He (Mr. *Greaves*, Plaintiff's solicitor,) informs me he shall take proceedings to set aside your defence and obtain judgment against you. This means in plain English that he will obtain a verdict against you for the recovery of the amount in the bank and costs without going to trial. So you can please yourself as to whether you bring the books or not. I have warned you often enough, and therefore you will be good enough not to blame me if through your own obstinacy such a disastrous result should take place.'

"On the 24th of April last I wrote the Defendant as follows:—"What I warned you of a week or two ago is about to come to pass. If you read the inclosed you will see that on Monday next at 12 o'clock the other side intend applying to have your defence struck out, which means, as I told you in a former letter, that judgment will be given against you, and that the money will go to your brother to be distributed amongst the family after getting his costs out of your own share, not out of the fund generally. If you like this prospect well and good. If not be good enough to come here to-morrow morning without fail, or at latest on Monday by 11 o'clock. Of course if you wish your brother to have it all his own way it is no concern of mine.'

"I received an order in the terms of the letter, and sent the same by registered post to the Defendant on the 29th day of April last, and on the same day wrote her as follows:—'I have sent up to your house and sent letters for you repeatedly, but can get no response. The Plaintiff has obtained an order to strike out your defence. If you are not here on or before Saturday your case is lost, and you will have all costs to pay.'

"On the 9th of May following I wrote her as follows:—'Last week I sent you a special letter warning you of the consequence of your failing to call here with your bank book in order that the other side might see it, such consequences being that your defence would be struck out and judgment given against you, and you to pay all costs. An order has been made accordingly, and now

notice has been further given that on Saturday next an application will be made for judgment. I'm not sure whether even now it might be possible for you to retrace your steps. But if not you can only have the consolation of blaming yourself. I inclose copy of the notice.—P.S. I registered this letter, and you returned it.'

"On the 14th of the same month the Defendant called at my office in reference to the correspondence, and said she would never produce the books whatever the consequences might be. I told her she might bring them to my office and stop there while Plaintiff's solicitors examined them, and she need not allow them to go out of her possession, but she still persistently refused to allow them to be seen. She did say that she would go to *London* on the hearing of the application for judgment, but I told her if she were willing to produce the books for inspection, that even at this last stage of the case I would inform the Plaintiff's solicitors of such willingness, and no doubt they would abandon the proceedings before the Judge in *London*, or if not, that I would take steps to prevent the matter, if possible, from going to extremes, but she would not listen to me, but said she would go to *London* herself. I told her if she were willing to obey the order of the Court and produce the bank books, she might go, but if she persisted in her refusal before the Court it would be useless for her to go to *London*. She replied, 'I never will produce them.' It is utterly untrue that I told her 'you will not be heard speak.' I told her to go by all means if she would express her willingness to the Court to produce the books, but she declared emphatically, 'I never will.'

"I have on many occasions in my interviews with the Defendant impressed upon her that the other side could not take away the books, but that they would remain in my own office, and that she could remain in the room herself whilst the inspection in pursuance of the order took place, but she absolutely refused even to shew the books to anyone, as she said she had been informed by a friend of hers that she need not produce them."

Higgins, Q.C., and *T. L. Wilkinson*, for the Defendant:—

The principle on which the Court acts in exercising its power

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under Order XXVII., rule 15, to set aside a judgment obtained on default, however wrong-headed or negligent the party in default may have been, is to set aside the judgment on terms that the party in default pay all costs occasioned by the default unless irreparable mischief has been occasioned, and to try the action on the merits: *Atwood* v. *Chichester* (1); *Carter* v. *Stubbs* (2); *King* v. *Sandeman* (3) (a case in which the plaintiff had preferred to let judgment go by default rather than take a nonsuit and commence a fresh action).

Cozens-Hardy, Q.C., and *Eyre*, for the Plaintiff:—

The cases cited establish that where the party in default has acted wilfully, with full knowledge, especially after a considerable lapse of time, matters will be allowed to take their course. To allow the applicant to succeed in such a case as this would be to say that the Court will always set aside a judgment obtained in default of pleading.

Higgins, in reply.

Nov. 16. PEARSON, J. (after stating the facts, continued):—

I have no hesitation in saying that I have the strongest disinclination, as I believe every other Judge has, that any case should be decided otherwise than upon its merits. But this order was introduced to prevent plaintiffs and defendants from delaying causes by their negligence or wilfulness. So great was my anxiety to relieve this lady from the consequence of her wrong-headedness if, by any possibility, I could on proper terms, that I hesitated to refuse to make the order asked for, and I have looked into all the cases I could find on the subject to see what the practice of the Court has been on this order. And I can find no case in the books where it has been applied, where a man knowingly and wilfully has allowed judgment to go by default. The first case to which I will refer is that of *King* v. *Sandeman*. The head-note, which is substantially right, is this: "The plaintiff being unready to proceed with the trial of his action when it

(1) 3 Q. B. D. 722. (2) 6 Q. B. D. 116.
(3) 26 W. R. 569.

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came on unexpectedly, applied for a postponement, and upon its being refused, let judgment go by default. The Court of Appeal, upon fresh materials offering a reasonable explanation of the plaintiff's unreadiness, set aside the judgment and ordered the action to be restored to the list on the plaintiff paying the costs of the day, including all costs thrown away." The late Master of the Rolls, Sir *George Jessel*, says this: "I do not decide this case with as much satisfaction as most cases. On the one hand, if we draw the string very tight, no plaintiff would be able to proceed to trial if not ready exactly at the day of trial. Solicitors would be required to do what they cannot always be sure of being able to do. On the other hand, we must be careful not to allow people to use the Court of Appeal to remedy the effects of carelessness. This case is very near the line. On the whole, I think the case should be tried on the merits." And then he says that the plaintiff could not with reasonable diligence have got all the material information till the 4th of March, from the 4th till the 7th the action was not in the paper, and a long way down the list. On the 8th it came on suddenly. Under these circumstances, the plaintiff being in default as little as he could be, the Court ordered the judgment to be set aside. Lord Justice *Thesiger*, who also went into the case (Lord Justice *Cotton* merely concurring), says this: "Certain material documents could not be obtained till the 4th of March. If a summons had then been taken out for time, it would have been a proper case for indulgence, and if so, the slip of the plaintiff's solicitor in thinking the case would not come on is not enough to take away the indulgence. The case is very near the line, but being doubtful, the doubt should be decided in favour of trying the action on the merits, instead of putting the plaintiff to the expense of bringing a new action." Another case cited was that of *Atwood* v. *Chichester* (1). That was a case in which a lady had signed at the request of her husband a promissory note. A writ was issued against her, she put it into her husband's hands to defend the action. Her husband did nothing, and judgment was signed against the defendant. Now, in that case, the action being against a married woman, was bad altogether, and Lord Justice

(1) 3 Q. B. D. 722.

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Brett said he thought the plaintiff knew she was a married woman, and he knew that no action could be brought, yet, in spite of that, Lord Justice *Brett* says (1), "from the facts before us, I draw the inference that when she handed the writ to her husband, she did not understand its meaning, and that she did not know the consequences of suffering judgment by default. After various other proceedings, a summons is taken out to commit the defendant. Now, if it could have been shewn that the object of the writ was at the time of service explained to her, she could not at this stage of the proceedings have been permitted to defend after suffering judgment by default; but she does not appear to have been informed by her husband what her position really was. I agree with the view of Lord Justice *Bramwell;* the plaintiff could not have successfully prosecuted this action." Lord Justice *Cotton* says this: "None of the provisions of the *Judicature Acts* have rendered a married woman liable to be sued as if she were unmarried. I should have thought that if the defendant had lain by intentionally, she could not be now allowed to appear; but the neglect to defend must be attributed to her husband, and she cannot be considered to have been guilty of such laches as to disentitle her to relief." It seems to me that there is no case which has gone to shew that this rule can be acted upon where the party who seeks to put it in force has, with full knowledge and wilfully, allowed judgment to go by default. Therefore I must refuse the application, and, I am afraid, with costs.

Solicitors: *Atkinson & Dresser*, agents for *C. Gray, Leeds; Williamson, Hill, & Co.*, agents for *Greaves & Taylor, Bradford.*

(1) 3 Q. B. D. 724.

D. P.

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[1879 P. 212.]

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1886

Jan. 13, 14.

Administration Action—Costs—Deficient Personal Estate—Charge of Costs on specifically devised Realty—Costs of Probate Action.

A testator by his will made several specific legal devises of real estate, of which one was to *J.*, one of his executors, and another was to *L.* And he devised the remainder of his real estates, and bequeathed his personal estate to trustees, upon trusts for sale and conversion, and to stand possessed of the proceeds upon trust, after payment of his debts and funeral and testamentary expenses, to pay certain pecuniary legacies, and he gave the residue of the trust moneys unto and equally between his paternal next of kin. *J.* alone proved the will. The estates devised to *J.* and *L.* had, under the provisions of a settlement, been respectively liable to have two sums of £3000 and £1200 respectively raised out of them. The right to those sums had become vested in the testator. An action to administer the testator's estate was brought by *W.*, one of the residuary legatees, against *J.* and *L.*, the only question in dispute being whether the two sums of £3000 and £1200 were raisable as part of the testator's personal estate. It was held that they were not raisable, but that they had become merged in the estates on which they were respectively charged. The result of this decision was, that the personal estate was deficient. An action had been previously brought in the Probate Division, by *W.* and another residuary legatee, against *J.*, impeaching the validity of the testator's will. The Court pronounced for the validity of the will, but ordered that the costs of all parties to the action should be paid out of the personal estate. On the further consideration of the administration action:—

Held, that the personal estate and the proceeds of the sale of the residuary real estate must be applied in paying: (1) the costs, as between solicitor and client, of the executor, and his costs, charges, and expenses properly incurred (including his costs of the Probate action); (2) the costs, as between party and party, of the Plaintiff and of the Defendant *L.* rateably; and that, there being a deficiency, the costs of the action (so far as not provided for) must be borne by the specifically devised real estates rateably, according to their respective values at the time of the testator's death:—

Held, that there was no jurisdiction to charge the costs of the Probate action (other than the executor's costs) on the real estate:—

Held, also, that the above order could be made, though some of the specific devisees were not before the Court.

But, whether the order could be enforced against the absent specific devisees, *Quære.*

FURTHER CONSIDERATION of an administration action.

The principal question to be determined was, how the costs of

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the action and the costs of an action in the Probate Division were to be borne, the personal estate of the testator being insufficient.

The action was brought in July, 1879, for the administration of the real and personal estate of *Thomas Price* (who died a bachelor on the 12th of August, 1875), and the execution of the trusts of his will.

The Plaintiff was one of his residuary legatees.

By his will, dated the 23rd of September, 1862, the testator, after reciting that he was seised of a farm and lands called *Newton West*, expectant on the death of his father, subject to a sum of £3000 raisable thereout upon the second marriage or death of his father, gave the same, subject as aforesaid, to *P. H. Hitchings* and the Defendant *W. H. Jenkins*, their heirs and assigns for ever. And the testator, after reciting that he was seised of a messuage and lands called *Clynbach*, expectant on the death of his father, subject to a sum of £1200 raisable thereout upon the second marriage or death of his father, gave the same, subject as aforesaid, to *Jane Lloyd*, the wife of *Samuel Lloyd*, for her life, for her separate use, with remainder to her two children *Joel Lloyd* and *Margaretta Lloyd*, their heirs and assigns. The testator made several other specific devises of real estate, and he devised the remainder of his real estate to trustees, and he bequeathed his leasehold estates and his other personal estate to the same trustees, upon trusts for sale and conversion, and to stand possessed of the proceeds upon trust, after payment of his debts and funeral and testamentary expenses, to invest the surplus, and to pay the income to his father during his life, and after his death to convert the trust fund into money and to pay thereout the several pecuniary legacies next thereinafter bequeathed, and the testator gave the residue of the trust moneys unto and equally between such of his paternal next of kin, in exclusion of his maternal next of kin, as would have been entitled to the same if he had died intestate. And he appointed *William Lock* and the Defendant *W. H. Jenkins*, trustees and executors of his will.

The will was proved by the Defendant *Jenkins* alone. The testator's father, *P. H. Hitchings*, *Jane Lloyd*, and *Joel Lloyd*, all

died before the testator. *Margaretta Lloyd*, in July, 1875, married *William Davies*.

The Plaintiff in the present action was one of the testator's paternal next of kin.

The validity of the testator's will was disputed by some of his next of kin, and an action was brought in the Probate Division, by the Plaintiff in the present action and another of the next of kin, against the executor, to determine the validity of the will. The Court pronounced for the validity of the will, but ordered that all the costs of the action should be paid out of the testator's personal estate. Probate of the will was granted to *W. H. Jenkins* on the 8th of February, 1878.

W. H. Jenkins and Mr. and Mrs. *Davies* were the Defendants to the present action. The main question raised in it was, whether the charges of £3000 and £1200 mentioned in the testator's will were, in the events which had happened, raisable as part of his personal estate, or whether they had become merged. They were originally charged on the estates called *Newton West* and *Clynbach* respectively by a deed dated the 9th of October, 1843, and they had in the events which had happened become vested in the testator.

On the 26th of February, 1880, a decretal order was made in the action, on the application of the Plaintiff under rule 1 of Order xv., by which various accounts and inquiries (twenty-eight in number) were directed to be taken and made. The seventh inquiry was, whether the two sums of £3000 and £1200 were still raisable.

The Chief Clerk, by his certificate, found that the two sums of £3000 and £1200 were still raisable out of the properties on which they respectively were charged. On a summons to vary the certificate in this respect, Mr. Justice *Pearson* held that the two sums were not raisable, but that they had become merged, and his decision was affirmed by the Court of Appeal.

The testator's residuary real estate had been sold and the proceeds of sale paid into Court. These proceeds, together with the residuary personal estate, were insufficient for the payment of the costs of the action and the costs of the Probate action, and the principal question now to be determined was, whether

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the deficiency could be raised out of the specifically devised real estates, and, if so, to what extent?

Cozens-Hardy, Q.C., and *Vernon R. Smith*, for the Plaintiff:—

The Plaintiff's costs of this action ought, in so far as the residuary personal estate and the proceeds of the sale of the residuary real estate are insufficient, to be raised out of the specifically devised real estates. There is no specifically devised personalty and no descended real estate, and, this being an administration action, there is power to charge the deficiency on the specifically devised real estates: *Jackson* v. *Pease* (1); *Bagot* v. *Legge* (2).

The Plaintiff's costs of this action ought to be paid out of the residue in priority to the Defendants' costs of the Probate action: *In re Mayhew* (3).

Barber, Q.C., and *Eyre*, for the Defendant *Jenkins*:—

There were no trusts to be executed in relation to the specifically devised real estates; the Court had only to administer the residuary real and personal estate. The specifically devised estates had not to be administered; the only question relating to them (and that did not affect all the specifically devised estates) was whether the charges were raisable out of them.

[PEARSON, J.:—Every one who took an interest under the will was interested in having the question determined whether the charges were raisable or not.]

That question might have been more quickly and more cheaply determined by an action claiming to have the charges raised, and then, if the Plaintiff had failed, he would have had to pay the costs of the action. Many of the accounts and inquiries directed in the action were unnecessary, and the Plaintiff ought not to be allowed any costs of such accounts and inquiries, even if he is not ordered to pay costs: *Croggan* v. *Allen* (4); *In re McClellan* (5). It would be unjust to throw the Plaintiff's costs of this action on the specifically devised estates. The two cases

(1) Law Rep. 19 Eq. 96.
(2) 2 Dr. & Sm. 259.
(3) 5 Ch. D. 596.
(4) 22 Ch. D. 101.
(5) 29 Ch. D. 495.

cited do not apply. In *Bagot* v. *Legge* (1) some of the specific devisees were plaintiffs, and the others, as well as the testator's heir-at-law, were before the Court; and the legal estate was in trustees. This appears from the report of the case (2). In the present case the Plaintiff is not a specific devisee, and the devises to the Defendants are legal, not equitable. In *Jackson* v. *Pease* (3) the plaintiff was a specific devisee; the defendants were the trustees of the will, and they took the legal estate in the other specifically devised realty, the specific devisees having only equitable interests. The trustees, therefore, represented the specific devisees other than the plaintiff. When all the specific devisees are before the Court it can apportion the costs among them. In the present case some of the specific devisees are not before the Court, and an order affecting the estates devised to them cannot be made in their absence.

[PEARSON, J.:—Why cannot the Court make those who are here bear their proportion of the costs?]

There is no precedent for such an order.

[PEARSON, J.:—I could adjourn the further consideration, giving liberty to serve the other specific devisees.]

Such an order has never been made against a legal devisee.

[PEARSON, J.:—In *Jackson* v. *Pease* one of the specific devises was legal.]

The Plaintiff has practically failed in this action. The only real dispute was, whether the charges were raisable out of the specifically devised estates as part of the testator's personal estate, and on that question the Defendants have succeeded. It would be a great hardship that they should have to pay the costs of that litigation. The costs of this action must have priority over those of the Probate action: *Major* v. *Major* (4); *In re Mayhew* (5), and there is no jurisdiction to charge the Plaintiff's costs of the Probate action on the real estate. The Defendant *Jenkins* is entitled to have his costs of this action, and his costs, charges, and expenses properly incurred (including his costs of

(1) 2 Dr. & Sm. 259.
(2) 34 L. J. (Ch.) 156.
(3) Law Rep. 19 Eq. 96.
(4) 2 Drew. 281.
(5) 5 Ch. D. 596.

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the Probate action), as between solicitor and client, paid in priority out of the residuary personalty, and the proceeds of the sale of the residuary realty, which are given on trust for the same purposes. The Plaintiff should then have his costs of this action out of the residue of the same fund. He can only have his costs of the Probate action out of that residue, but there will not be enough to pay his costs of this action.

H. R. Webbe, for Mr. and Mrs. *Davies*, adopted the same arguments.

Cozens-Hardy, in reply:—

I admit that the Plaintiff's costs of the Probate action cannot be charged on the real estate: *Charter* v. *Charter* (1). But I say that the executor is not entitled to have his costs of the Probate action out of the personalty in priority to the Plaintiff's costs of this action.

PEARSON, J. (after stating the facts, continued):—

Some observations have not unnaturally been made upon the numerous inquiries which were directed by the order for administration, but they were to a very great extent merely formal inquiries, their object being simply to bring before the Court a statement of the facts which it was necessary that the Court should know in order that it might be able to come to a conclusion upon the matters in question. The main subject of contention was the liability of the specifically devised estates to contribute the two sums of £3000 and £1200 to the personal estate. The Chief Clerk found that those sums were raisable. I decided that they were not raisable, and I ordered the certificate to be varied accordingly. The question, however, being a difficult one, and one which was properly brought before the Court, and which, to my mind, could not have been decided without the intervention of the Court, I expressed an opinion that the costs of the summons to vary should be costs in the action. I think I intended to say that I thought those costs had been properly incurred, and ought in some way to be defrayed out of the estate. It was intimated to

(1) 3 Ch. D. 218.

me immediately after I had pronounced my judgment that the parties proposed to take the opinion of a higher tribunal, and thereupon the further consideration was ordered to stand over until the result of the appeal should be ascertained. The Court of Appeal affirmed my decision, and ordered the Appellants to pay the costs of the appeal. If it had been supposed that I was wrong in thinking that the costs of the summons should be costs in the action, there was then an opportunity of asking the Court of Appeal to set that part of my order right, because the appeal was from the whole of my decision, and the Court of Appeal had jurisdiction to alter my order as to the costs, if they thought I was wrong. However, this was not done.

The case now comes on for further consideration, and the result of the litigation is this, that, inasmuch as it has been decided that the £3000 and £1200 are not raisable, the personal estate of the testator is insufficient to pay even the costs of the action, including the costs in the Probate action, and of course it is insufficient to pay the legacies. The question is, in what mode and to what extent are the costs to be paid out of the property which is being administered by the Court? The only mode of paying them entirely is by taking such personal estate as exists, and supplementing it by the real estate, including that which is specifically devised, and making the specific devisees contribute proportionately to the values of their interests. Mr. *Barber* and Mr. *Eyre* have contended with great force that it would be very hard that the Defendants, who are specific devisees, should be called upon to pay any costs out of their specific devises. They say that the only question in dispute was, not as to the administration of the devised estates, but a question between the personal estate and the devised estates, whether or not the sums which I have mentioned were to be considered as existing charges upon the devised estates for the benefit of the personal estate. The Court decided that they were not. It has, therefore, decided that the contention of the Plaintiff for the benefit of the personal estate, and for his own benefit as one of the residuary legatees, was erroneous, and, that being so, it would be very hard that the Defendants, who have succeeded in their contention, should be called upon now to pay the costs of determining that question in

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their own favour. No doubt costs often fall very hardly on litigants, but you cannot have litigation without costs, and, if I may so say, *interest reipublicæ* that costs should be paid. The question is whether these costs are properly costs of an administration action which ought to be paid in the ordinary way in which the costs of administration actions are paid. Mr. *Eyre* says that all this litigation might have been conducted in a way which would not only have exonerated his client from the payment of any costs, but would have made it absolutely necessary, according to the rule and practice of the Court, that the Plaintiff should pay all the costs. If, he says, instead of a general administration action, the Plaintiff had simply brought his action against the Defendants, as devisees, claiming to have these sums raised for his own benefit, and had been unsuccessful, he would have had to pay the costs, and the Defendants would not have been called upon to contribute to them. But, to my mind, this is an administration action, and I am bound by the rules and practice of the Court to direct that the costs shall be paid in the manner in which the costs of an administration action are always paid. It is an administration action not only in form but in substance. It was an application to the Court to determine of what the personal estate of the testator consisted, and of what the specific devises consisted, whether the specific devises consisted of the devised properties subject to certain charges, or whether those properties were freed from those charges, and the Court, in administering the whole estate of the testator, has come to the conclusion that the personal estate is not entitled to have the charges raised for its benefit, and the result is that under the decision of the Court the specific devisees get their estates freed from the charges, and the personal estate goes without the benefit it would have received if its right to the charges had been established. To my mind it is clearly an action for the administration of all the property comprised in the testator's will, and as such I must treat it.

If that be so, I am bound by the rules of the Court as to the proper way of satisfying the costs. The personal estate is insufficient to pay all the costs. It is admitted that the costs of this action take precedence over the costs of the Probate action. The result will be this, that the Defendant *Jenkins*, as executor, must

have his costs of this action, and his costs, charges, and expenses properly incurred (including his costs of the Probate action), as between solicitor and client, paid first out of the personal estate. The Plaintiff and the other Defendant must have their costs of this action rateably as between party and party, and, so far as the personal estate is insufficient to pay them, they must be assessed upon the specifically devised estates in proportion to the values of those estates respectively at the time of the testator's death. With regard to the Plaintiff's costs of the Probate action which were made a charge upon the personal estate, Mr. *Cozens-Hardy* has very properly admitted that they cannot be satisfied out of the real estates. I understand that the residue of the personal estate will be insufficient to pay the Plaintiff's and the second Defendant's costs of this action, and I need not, therefore, say anything about the Plaintiff's costs in the Probate action.

It is said that some of the specific devisees are not before the Court. I make the order in this form with the view of protecting the Defendants from paying more than their proper quota. The absence of some of the specific devisees cannot prevent me from making the order as regards those devisees who are present. Whether the order can be enforced against those specific devisees who are absent, I must leave the Plaintiff to consider hereafter.

Cozens-Hardy:—The proceeds of the sale of the residuary real estate were, under the trusts of the will, applicable to the payment of costs in the same way as the personal estate. The executor's costs of the Probate action are "testamentary expenses."

PEARSON, J.:—The personal estate and the proceeds of sale of the residuary real estate form one fund.

Solicitors for Plaintiff: *Peacock & Goddard*, agents for *Eaton Evans, & Williams, Haverfordwest.*

Solicitors for Executor: *G. L. P. Eyre & Co.*, agents for *Morgan-Richardson, Cardigan.*

Solicitors for the other Defendant: *W. & W. Rees Davies & Co.*, agents for *Davies, George, & Co., Haverfordwest.*

W. L. C.

PEARSON, J.

1886

Jan. 16.

RIPLEY *v.* SAWYER.

[1885 R. 2182.]

Partition Action—Motion for Judgment in default of Pleading—Infant Defendants—Evidence.

On a motion for judgment in default of pleading by the Plaintiffs in a partition action, some of the Defendants being infants:—

Held, that it was not necessary that any affidavit should be made verifying the statements in the statement of claim.

THIS was a partition action.

Joseph Nelson, by his will, dated the 6th of June, 1868, devised the residue of his real estate (after the death of his wife, to whom he had given a life estate) unto and to the use of his two daughters, *Mary* and *Ann*, as tenants in common, for and during the term of their respective lives, and, from and after the deaths of his daughters respectively, he devised the share of such daughter so dying to the issue of such daughter, such issue nevertheless taking only his or her deceased parent's share amongst them *per stirpes* and not *per capita*. But, if either of his said daughters should die without leaving lawful issue her surviving, then he directed that the share of his said daughter so dying without issue of and in the said residue of his said real estate should go to and be vested in the survivor of them his said daughters absolutely; and, in case both his said daughters should die without leaving lawful issue them surviving, then he devised the said residue to his own right heirs in fee. And he declared that all females taking any devise, bequest, share, or interest under his will should hold or take the same for their respective sole and separate use.

The testator died on the 22nd of February, 1869, and his widow died on the 4th of December, 1882.

The daughter *Ann* married *John Ripley*. At the time when the action was commenced she had had three children only. One of them died an infant in August, 1874; the other two were infants.

The daughter *Mary* married *W. A. Sawyer*. At the commence-

ment of the action she had had six children only. One of them had died in infancy; of the other five one had attained twenty-one, and four were infants.

The action was brought by Mrs. *Ripley* and her two infant children (by a next friend), against Mrs. *Sawyer* and her five children, claiming a partition of the property which formed the residuary real estate of the testator.

The Defendants did not deliver any statement of defence.

The Plaintiffs now moved for judgment in default of pleading.

Bardswell, for the Plaintiffs, submitted, whether, there being infant Defendants, there ought to be an affidavit verifying the statements in the statement of claim: *Senior* v. *Hereford* (1).

Eastwick, for the Defendants.

PEARSON, J.:—

I do not think that any affidavit is necessary; the ordinary inquiries will be a sufficient protection to the infants. If you had an affidavit you would be moving for judgment on your pleadings plus the affidavit.

Solicitors for Plaintiffs: *Jaques, Layton, & Jacques*, agents for *Joseph Scott, Leeds.*

Solicitor for Defendants: *John Cotton.*

(1) 4 Ch. D. 494.

W. L. C.

PEARSON, J.
1886
Jan. 21, 23, 29.

In re GREAT WESTERN FOREST OF DEAN COAL CONSUMERS COMPANY.

CARTER'S CASE.

Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 165 [*Revised Ed. Statutes, vol. xiv., p.* 238]—*Officer—Solicitor.*

A solicitor of a company is not an officer of that company within the meaning of sect. 165 of the *Companies Act*, 1862.

THE *Great Western Forest of Dean Coal Consumers Company* was registered on the 22nd of March, 1873, with the object, *inter alia*, of purchasing certain collieries at the price of £80,000, under a contract between *John Hooper*, as vendor, and *Maurice F. Carter* as trustee on the part of the proposed company. The collieries had been purchased in the name of *John Hooper* by *Henry R. Lükes*, *Francis Nash*, and *Edwin Crawshay*, the promoters of the company, for sums amounting together to £59,960. The three promoters of the company and three other persons were the directors of the company named in the articles, and *Maurice F. Carter* was the solicitor. He was employed by the promoters as their solicitor in the promotion of the company; he prepared the conveyances to *John Hooper*, the agreement for sale by him, and the prospectus.

This was a summons taken out by the official liquidator of the company under sect. 165 of the *Companies Act* to make the directors and *Maurice F. Carter* pay £20,040, the profit made by the promoters on the sale of the collieries to the company. The matter was compromised between the liquidator and all the Respondents except *Edwin Crawshay*, *Francis Nash*, and *Maurice F. Carter*. The summons was not defended by *Nash*.

Everitt, Q.C., and *Ryland*, for the liquidator:—

The solicitor of a company is an officer, it has been so held under sect. 43 of the *Companies Act*, 1862: *Ex parte Valpy and Chaplin* (1); in that case the solicitor in question was not the regular solicitor of the company; *à fortiori* is a person who is the

(1) Law Rep. 7 Ch. 289.

solicitor named in the prospectus and articles as solicitor, and a man who took an active interest in the promotion, an officer, and in such fiduciary character towards the company that he is within the summary jurisdiction given by sect. 165.

Cookson, Q.C., and *Warrington*, for *Carter*:—

Ex parte Valpy and Chaplin (1) is not good law: *Knowles' Case* (2). If it were good law it would not conclude this case, for it was decided on a different section, not necessarily because the solicitor in default was an officer of the company or liable to the penalty imposed by the Act. Their solicitor is in no different position from that of any other professional person employed by a company, and, according to the ordinary meaning of words, he is not an officer, and this has been held in *In re Great Wheal Polgooth Company* (3).

Warrington, for *Edwin Crawshay*.

Everitt, in reply.

PEARSON, J. (after deciding that *Edwin Crawshay* was liable, continued):—

The other part of the case is, I confess, less satisfactory and less easy to dispose of,—the application, I mean, against *Carter*. First, it is said that he is liable under sect. 165 as the solicitor of the company, because he was as such an officer of the company. If the matter were *res integra*, I should have great difficulty in holding that a solicitor is an officer of the company within the words of the section. A banker has been held not to be an officer: *In re Imperial Land Company of Marseilles* (4), and to my mind a solicitor stands in the same position towards the company as a banker does. The solicitor does certain business for the company, which the company applies to him to do from time to time at the ordinary remuneration just as other clients do. I am at a loss to see how a solicitor by taking upon himself that professional duty puts himself in any other

(1) Law Rep. 7 Ch. 289.
(2) 6 Ch. D. 556.
(3) 53 L. J. (Ch.) 42.
(4) Law Rep. 10 Eq. 298.

PEARSON, J. 1886 CARTER'S CASE.

relationship to the company than he stands in to his other clients. They come to him when they want him. They can discharge him or cease to send him work. They can part company as and when they please. His remuneration is not a salary paid to him as an officer: but the ordinary remuneration which, according to the ordinary well-established scale of fees, he is entitled to demand either from a company or a private individual who is his client. The only case referred to as shewing he is an officer is *Ex parte Valpy and Chaplin* (1), before the Court of Appeal, which on other grounds has been very strongly commented upon. In that case a solicitor, not the regular solicitor of the company, but a solicitor who was employed in a particular transaction, had taken a mortgage from the company for his costs, he had neglected to have that mortgage registered, and it was held by the Court of Appeal that inasmuch as the mortgage was not registered it was invalid. As the late Master of the Rolls pointed out in *Knowles' Case* (2), the effect of that is to impose on the mortgagee for not registering a penalty greater than that imposed by the Act. I do not think that case would be followed now.

I do not like to make over nice distinctions: but although the words in the 43rd section are the same as the words in the 165th section, I think I am not bound, considering the very different objects of those sections, to construe the one by the other. I therefore hold, notwithstanding the case of *Ex parte Valpy and Chaplin*, that under the 165th section the solicitor of the company is not an officer of the company. That being so, I have no jurisdiction in this case to make the order asked against the Respondent *Carter*.

Solicitors: *Clarke, Woodcock, & Ryland; Wilkins, Blyth, & Dutton.*

(1) Law Rep. 7 Ch. 289. (2) 6 Ch. D. 561.

D. P.

In re RHODES.

PEARSON, J.

1886

Feb. 6.

Practice—Payment out—Rules of Supreme Court, 1883, *Order* LV., *r.* 2, *sub-r.* 1.

The Court refused to order payment out of Court of a sum over £1000 on summons.

In re Brandram (1) dissented from.

IN October, 1883, the trustees of the will of *John Rhodes*, deceased, paid into Court under the *Trustee Relief Acts* a sum of £1394 8*s.* 2*d.*, which represented a share of the testator's residuary estate bequeathed by the testator in favour of his son *Alfred Rhodes*, his issue and representatives. A summons was taken out by the administrator of *Alfred Rhodes* for the payment out to the Applicant of that sum and interest, amounting in the whole to £1448 12*s.* 6*d.*, upon evidence that *Alfred Rhodes* had attained twenty-one and died intestate. The Chief Clerk objected to make the order on summons, on the ground that the amount to be paid out was over £1000.

Bardswell, for the application:—

I submit whether, on the authority of *In re Brandram*, before Vice-Chancellor *Bacon*, the order ought not, under Order LV., rule 2, sub-r. 1, to be made on summons without the formality of a petition, the right of the applicant depending only on the identity and death of *Alfred Rhodes*. The administrator would not have been justified, in the face of that decision, in incurring the costs of a petition, which might be disallowed him.

PEARSON, J.:—

I have the misfortune to differ from Vice-Chancellor *Bacon*. My feeling is very strong against disposing of large sums in this way. I think it is much better where the amount to be disposed of is so large, that the facts should be stated in a petition, in case the matter has to be questioned in any way. If the Court of

(1) 25 Ch. D. 366.

PEARSON,J. 1886 *In re* RHODES.

Appeal says that I am bound to order payment out on summons, of course I must do so. I have not a word to say against the persons who come before me in Chambers; many of them do their business exceedingly well; at the same time an order made in Chambers is made without the safeguards which protect an order made in Court on petition. In a petition all the facts are stated, and the Judge can refer to that statement if he finds any difficulty in determining what order he ought to make. In Chambers there is no written *précis* of the facts, but the Judge has to collect them as best he can from the oral statement of them made to him from deeds, documents and affidavits. A petition had better be presented: the petition should be attached to my branch of the Court.

Solicitors: *Jaques, Layton, & Jaques,* agents for *Lancaster, Wright, & Richardson, Bradford.*

D. P.

PEARSON,J. 1886 *Feb.* 6, 13.

JENNER-FUST *v.* NEEDHAM.

[1883 J. 1094.]

Mortgage—Foreclosure—Order absolute—Discharge of Receiver—Receipt of Rents by Receiver after Certificate and before Day fixed for Redemption.

If, between the date of the certificate under a foreclosure judgment and the day fixed for redemption, rents of the mortgaged property have been received, either by the mortgagee or by a receiver appointed in the action, those rents must go in reduction of the amount due to the mortgagee, and a fresh account must be taken.

But, if, after the day fixed for redemption, the mortgagee receives rents, the certificate will not be reopened, and the mortgagee is entitled to retain the rents so received.

THIS was a foreclosure action.

On the 26th of July, 1883, a receiver of the rents of the mortgaged property was appointed.

On the 26th of April, 1884, on a motion for judgment by the Plaintiffs in default of pleading by the Defendants, the ordinary foreclosure judgment was given. The time fixed for redemption was six months after the date of the certificate.

The certificate was made on the 2nd of July, 1885. It found that there was then due to the Plaintiffs under their mortgage security the sum of £10,000 principal; £1004 13*s.* 9*d.* for interest; and £215 11*s.* 2*d.* for the taxed costs of the action; and that there would be due to the Plaintiffs on the 2nd of January, 1886, the sum of £193 6*s.* 8*d.* for further interest.

The Defendants failed to pay the amount found due from them at the time appointed, and the Plaintiffs now applied for an order absolute for foreclosure. The receiver made an affidavit that he had a sum of £1094 in his hands. This sum had arisen from rents received by him since the date of the certificate, but before the 2nd of January, 1886.

Nalder, for the Plaintiffs, asked for a foreclosure order absolute, and that by the same order the receiver might be discharged without passing his accounts; that his recognizance might be vacated; and that he might be ordered to pay the money in his hands to the Plaintiffs.

[PEARSON, J.:—I am afraid of reopening the foreclosure.]

In *Brown* v. *Harper* (1884 B. 969), Mr. Justice *Kay*, on the 19th of February, 1885, on making an order for foreclosure absolute, by the same order directed that the receiver who had been appointed in the action should be discharged, and, by consent of the Plaintiff, that his recognizance should be vacated. In *Dugdale* v. *Burkinshaw* (1883 D. 515), Mr. Justice *Chitty*, on the 20th of May, 1885, on making an order for foreclosure absolute, by the same order directed that the receiver who had been appointed in the action should be discharged without passing his accounts.

PEARSON, J.:—

You must serve the mortgagors with notice of the application. If the receiver had not received anything I should feel no difficulty in discharging him at once. But I will make the order if the mortgagors do not shew some good reason to the contrary.

Feb. 13. The mortgagors having been served, the application was renewed.

PEARSON, J. 1886 JENNER-FUST v. NEEDHAM.

Nalder, for the Plaintiffs.

Willis-Bund, for the mortgagors:—

A fresh account ought to be taken, so as to include the £1094 which is in the receiver's hands. If the Plaintiffs receive that sum, the amount due to them will be to that extent diminished. The mortgagors might then be able to redeem. The Plaintiffs cannot have the estate and also the £1094. If a mortgagee himself receives rents after the account has been taken and before the day appointed for redemption, it is plain that the account mus be opened: *Geldard* v. *Hornby* (1); *Prees* v. *Coke* (2). It can make no difference that the rents are in the hands of a receiver. A new time for redemption ought to be fixed, and the receiver ought to pass his accounts.

Nalder, in reply:—

The money was *in medio* at the time appointed for redemption, and it will not be received by the mortgagees till after that day. It is like the case of overdue rents in the hands of tenants, and not actually received by a mortgagee till after the day appointed for redemption. In such a case the receipt of the rents by the mortgagee after that date does not open the foreclosure: *Constable* v. *Howick* (3); *Webster* v. *Patteson* (4).

PEARSON, J.:—

When rents are outstanding in the hands of tenants they are *in nubibus;* when they are in the hands of a receiver they are *in gremio legis.* I do not think that I ought to make the order absolute now. Before the day appointed for payment of the amount found due to the Plaintiffs, in default of which payment the Plaintiffs would be entitled to foreclosure absolute, the receiver had received rents to the amount of £1094. That sum has not been taken into account in the certificate. I am now asked to make the foreclosure order absolute; to order the £1094 to be paid to the mortgagees; and to discharge the receiver. To my mind it is plain that the £1094 ought to go in reduction of what

(1) 1 Hare, 251.
(2) Law Rep. 6 Ch. 645, 650.
(3) 5 Jur. (N.S.) 331.
(4) 25 Ch. D. 626.

is due to the Plaintiffs for principal, interest, and costs, for it was not received after the day appointed for payment by the mortgagors, but was then *in medio* in the hands of the officer of the Court. I cannot, therefore, hold that the mortgagors are bound by the certificate without taking into account the sum in the receiver's hands. It is quite true that, when a mortgagee has obtained an order absolute for foreclosure, or is in a position to obtain it, it has been held that the subsequent receipt of rents by him will not open the certificate, but that is because the mortgagee has then become, or is entitled to become, the absolute owner of the mortgaged property. In the present case the mortgagees were not in that position when the rents were received by the receiver. I must, therefore, order the receiver to pass his accounts, and a fresh account to be taken between the Plaintiffs and the Defendants, so as to include the £1094, and I shall give the Defendants one month from the date of the fresh certificate to redeem. The costs of the present application will be costs in the action.

Solicitors for Plaintiffs: *Russell & Hill.*
Solicitor for Defendants: *A. Hunt.*

W. L. C.

C. A.
1885
Nov. 20;
Dec. 18.

In re RIDGE.
HELLARD *v.* MOODY.

[1884 R. 2485.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 11, 63—*Mineral Lease—Setting aside part of Rent—Tenant for Life impeachable for Waste—Person entitled for Life to Income of Proceeds of Land subject to Trust for Sale and to Rents until Sale.*

A person who is entitled for his life to the income of the money to arise from the sale of settled land and to the rents and profits of the settled land until sale, although to be deemed a tenant for life under sect. 63 of the *Settled Land Act*, 1882, is not, properly speaking, "impeachable for waste in respect of minerals" within the meaning of sect. 11.

Nevertheless, where a lease of unopened minerals is made by such a person under the provisions of the Act, three-fourths of the rents and royalties should be set aside as capital moneys arising under the Act and the residue only should go as rents and profits.

Order of *Bacon*, V.C., varied.

UNDER two indentures of settlement, dated respectively the 19th of September, 1840, the testator, *Thomas John Ridge*, was absolutely entitled as personal estate to three fifth parts of fourth-fifths of the proceeds of certain freehold lands in the county of *Southampton*, vested in trustees upon trust for sale, and to three fifth parts of four-fifths of the rents and profits of such lands until sale.

The only power of granting leases contained in the settlement was a power for the trustees, until the parts or shares therein comprised should be sold, to let and demise the same, or any part thereof for the time being unsold, at rack-rent either from year to year or for any term or number of years not exceeding twenty-one years in possession, and with and under such covenants as the trustees should think proper.

Thomas John Ridge, by his will, dated in February, 1873, devised certain real estate in trust for his sister, the Defendant Mrs. *Moody*, during her life, she keeping the same in good substantial condition, but being otherwise not liable for waste, and he bequeathed his personal estate producing income to his executors (of whom Mrs. *Moody* was one) upon trust for payment of his debts and funeral and testamentary expenses, and subject

thereto upon trust for conversion and investment and payment of the annual produce to Mrs. *Moody* for her life, and after her death in trust for other persons. The will also contained a gift of furniture and other specific chattels, together with the residue of the personal estate, to Mrs. *Moody* absolutely.

The testator died in December, 1873.

By an indenture of lease dated the 18th of June, 1884, the trustees of the settlement, with the concurrence of the trustees of the will of *Thomas John Ridge*, and the beneficiaries and co-owners under those instruments (certain of such co-owners acting therein as tenants for life and in exercise of the powers conferred upon tenants for life by the *Settled Land Act*, 1882) demised for brick-making purposes a portion of the settled land which had never before been opened, for the term of five years from the 1st of January, 1884, at the yearly rent of £33 for the use of the surface, and the further yearly rent of £317 for 2,000,000 of bricks whether actually manufactured or not during each year, and the further rent or royalty of 3*s.* 4*d.* for every 1000 bricks which should be made by the lessee in every year of the term over and above the 2,000,000.

The *Settled Land Act*, 1882, provides (sect. 11) that under a mining lease, unless a contrary intention is expressed in the settlement, there shall be set aside, as capital money arising under the Act, where the tenant for life is "impeachable for waste in respect of minerals," three fourth parts of the rent and "otherwise" one-fourth part thereof, and in every such case the residue of the rent shall go as rents and profits. Sect. 2, sub-sect. 10, cl. ii., enacts that rent shall include royalty. Sect. 63, sub-sect. 1, enacts in effect that where any land is under any instruments subject to a trust for sale, and for the application of the sale moneys or of the income of the sale moneys or of the land until sale for the benefit of any person or persons for any limited period, the person or persons for the time being beneficially entitled to the income of the land until sale are to be "deemed to be" or to constitute together the tenant for life thereof; and by sub-sect. 2 in every such case the provisions of the Act referring to a tenant for life are to extend to the person or persons aforesaid.

C. A. 1885 *In re* RIDGE. HELLARD *v.* MOODY.

After the execution of the lease of the 18th of June, 1884, the question arose whether Mrs. *Moody* was within the meaning of the *Settled Land Act*, 1882, a tenant for life impeachable for waste in respect of minerals, so that three-fourths of the rents and royalties reserved by the lease must be set aside as capital, or "otherwise," so that only one-fourth thereof must be set aside.

This question was raised by summons before *Bacon*, V.C., who held, on the 1st of April, 1885, that Mrs. *Moody* ought to be treated as unimpeachable for waste, and accordingly that she was entitled to three-fourths of the rents and royalties, and that the remaining one-fourth must be set aside as capital.

From this decision the trustees of the will appealed.

Warrington, for the Appellants:—

The lease of the 18th of June, 1884, cannot be upheld, except as a lease under the provisions of the *Settled Land Act*, 1882, by persons who under sect. 63, sub-sect. 1, are to be deemed to be or to constitute together the tenant for life of the land. In every such case all the provisions of the Act referring to a tenant for life are to apply, and consequently, amongst others, sect. 11 with reference to the setting aside of part of the rent under a mining lease. And the only question is, whether Mrs. *Moody* is to be treated as "impeachable for waste in respect of minerals" or not. Apart from the Act, a person who is equitable tenant for life of the proceeds of sale of lands held upon trust for sale has no right to receive anything more than what is properly income as distinguished from capital. And such person is in the position of a tenant for life impeachable for waste in respect of minerals, so far as such an expression can be applied to him. Accordingly in this case three-fourths of the rents and royalties and not one-fourth only, as the learned Judge has directed, ought to be set aside as capital.

[He referred to *In re Earle & Webster's Contract* (1).]

Sir *Arthur Watson*, Q.C., and *W. C. Druce*, for the Respondents, Mr. and Mrs. *Moody*, after contending that the lease was valid either under the power in the settlement or by virtue of the assent of the executors, and citing on these points *Campbell* v.

(1) 24 Ch. D. 144.

Leach (1), *Daly* v. *Beckett* (2), and *Sugden* on Powers (3), continued:—

Supposing, however, this to be a lease deriving its validity from the *Settled Land Act*, 1882, under sect. 63 a person entitled for life or any limited period to the income of lands held upon trust for sale is to be deemed to be tenant for life thereof. Then turning to sect. 11, two conditions of things are contemplated, one where the tenant for life is impeachable for waste in respect of minerals, the other where he is "otherwise," *i.e.* where he is unimpeachable for waste. Not only is there nothing in this case to make Mrs. *Moody* impeachable for waste, but where real estate is devised for her benefit the testator expressly states that she is not to be liable for waste. Moreover, waste is inapplicable to personal estate; and though sect. 63 of the Act establishes the principle that persons in Mrs. *Moody's* position are to be dealt with as if they were actual tenants for life of land, the analogy can only be carried to a certain point, and cannot extend to such a thing as waste, which is unheard of in the law relating to personal estate. Mrs. *Moody* has no right whatever on this land, and could not be liable for waste committed upon it.

Warrington, in reply:—

An equitable tenant for life might be put in possession by the trustees, and might commit waste, and be accountable for it.

[FRY, L.J.:—Whenever a settlor has not stated that a tenant for life is not to be impeachable for waste, he is impeachable.]

No doubt, and an equitable tenant for life has the same rights as to timber as a legal tenant for life. He referred to *Earl Cowley* v. *Wellesley* (4).

THE COURT (*Lord Halsbury*, L.C., and *Lindley* and *Fry*, L.JJ.), reserved judgment.

1885. Dec. 18. LINDLEY, L.J.:—

I have been requested to give the judgment of the Court in this case.

(1) Amb. 740.
(2) 24 Beav. 114.
(3) 8th Ed. 735.
(4) 35 Beav. 635.

C. A. 1885 *In re* Ridge. Hellard *v.* Moody.

It will conduce to clearness if in order to determine the nature of Mrs. *Moody's* position she be treated as entitled for her life to all the rents and profits of the settled property, instead of being, as is in fact the case, entitled only to a fractional portion of them; and further, if we examine what her rights on this supposition would be irrespective of the Acts of Parliament.

Under the settlement and will and apart from any statute, Mrs. *Moody* may be regarded as equitable tenant for life of the proceeds of the sale of the settled property, and as entitled until sale to the rents and profits of that property. She cannot be properly said to be either impeachable or unimpeachable for waste. As applied to her, those expressions are meaningless. But as there are no open mines, quarries, or brickfields, and as there is nothing either in the will or the settlement entitling the trustees to commit waste for her benefit, or entitling her to the capital moneys produced by selling the land, she would only be entitled to the income produced by letting the land to any ordinary tenant, or to the income arising from its sale.

As between a tenant for life and remainderman, money paid by a lessee as the price of land won, or carried away and sold by the lessee in the shape of minerals, stones or bricks, is always treated as capital, and not as income, unless the settlor has expressed an intention to the contrary by making the tenant for life unimpeachable for waste, or by some other expression; or unless at the time of the settlement the mines and minerals let were open, in which case an intention to the contrary is inferred unless such inference is inconsistent with the language of the settlement.

It was indeed argued that as *Ridge's* executors concurred in the lease, such lease could not be regarded by any one claiming under his will as in any way invalid, and that therefore Mrs. *Moody* was entitled to whatever rents and profits the lease produced. But this argument is not conclusive, for, assuming the lease to be valid, there is nothing in the will to entitle Mrs. *Moody* to that which is obviously capital representing the land itself, whereas it is tolerably obvious that the executors joined in the lease rather as trustees than as executors for the purpose of raising money in order to pay *Ridge's* debts, or funeral and testamentary expenses or legacies.

It is further clear that the part of *Ridge's* will applicable to this property is that part which disposes of his personal property yielding income, and not the last clause relating to the furniture and residue bequeathed to Mrs. *Moody* absolutely.

In this case, therefore, apart from statute, Mrs. *Moody* would be entitled to the surface rent of £33 a year, but not to the £317 and other royalties representing the value of the brick earth sold to the lessee. The £317 and other royalties would be capital, and ought to be invested as such, and Mrs. *Moody* as tenant for life would only be entitled to the income of the investment. The Vice-Chancellor *Bacon* seems to have been of opinion that she ought to be treated as unimpeachable for waste, by reason of the clause in *Ridge's* will relating to certain real estate devised to her; but we cannot so construe the will. The disposition of the personal estate contains no words of reference to the disposition of the real estate. The two dispositions are quite distinct, and by the settlement Mr. *Ridge's* interest in the lands in question is expressly declared to be personal estate even while unsold.

We pass now to consider the operation of the *Settled Land Act* under which the lease of June, 1884, was granted. The material sections are sect. 2, sub-sects. 1 and 5, defining "settlement" and "tenant for life," sect. 2, sub-sect. 10, cl. 4, defining "mines and minerals," sect. 63 which in substance declares that a person entitled to the income of land held upon trust for sale is to be deemed tenant for life, and sect. 11 relating to the rents payable under mining leases. Sect. 63 has given rise to much controversy, and has been amended by the *Settled Land Act* of 1884; but we cannot construe it as extending only to the powers conferred by the Act on tenants for life, or, in other words, as not applying to sect. 11. The difficulty arises from having to apply the language of sect. 11 to persons to whom that language is not appropriate, but who by sect. 63 are to be deemed to be persons to whom such language is to be applied.

Sect. 11 runs thus: "Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for

C. A. 1885 *In re* Ridge. Hellard *v.* Moody.

life is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one-fourth part thereof, and in every such case the residue of the rent shall go as rents and profits." If sect. 11 is taken literally and by itself, then as Mrs. *Moody* is not a tenant for life impeachable for waste (such expression not being properly applicable to her), one-fourth only of the rents ought in this case to be capitalized. But so to construe the section, is in our opinion to sacrifice its true meaning, and, under cover of adhering to the words, to miss the object sought to be attained by them. If Mrs. *Moody* were really what she is to be deemed, namely, tenant for life, then, not being made unimpeachable for waste, she is to be impeachable for it, and she would be entitled to one-fourth only of the rents. It appears to us to be contrary to good sense, and to all sound principles of interpretation, to hold that she is entitled to more than she would be entitled to, if she were really what she is to be deemed to be.

No doubt at first sight the language of sect. 11 taken alone presents a difficulty in the way of this construction, but we think the true solution of the difficulty is so to construe the language of sect. 11 as to make the various sections of the Act harmonize, and produce a result which is sensible rather than ridiculous. We are therefore of opinion that the order appealed from should be varied, and that three-fourths of the testator's share of the rents and profits of the land in question should be capitalized, and one-fourth only of them should be paid to Mrs. *Moody*.

Solicitors for the Appellants: *Cunliffes & Davenport.*

Solicitors for the Respondents: *Crossman, Crossman & Prichard.*

W. W. K.

In re HASELDINE. GRANGE *v.* STURDY.

C. A. 1886 Jan. 25.

[1885 H. 1347.]

Will—Construction—Illegitimate Children—Codicil.

The testator, in 1860, was seized with paralysis at the house of his sister-in-law, *M. A. L.*, and her husband, and remained there till his death. *M. A. L.* had been married seven years, and had by her husband three children, aged sixteen, thirteen, and eleven, born before her marriage with him, but treated as legitimate. The testator was intimate with them. Being worse, he was advised by his medical attendant to make his will, and made one dated the 7th of October, 1860, containing the following dispositions:—"I give and bequeath the following legacies to the following persons (that is to say)," after which followed gifts of legacies to persons named, "an to each of the children of *M. A. L.* the sum of £5 for mourning, the same to be paid into the hands and on the receipt of the said *M. A. L.*, their mother, for them, notwithstanding her coverture and their minority." On the 5th of August, 1861, he made a codicil, by which he bequeathed £400, on the death of an annuitant, "unto and equally between all the children who shall be then living of *M. A. L.*, share and share alike," and confirmed his will except as varied by the codicil. He died two days afterwards. *M. A. L.*, who was aged forty-four when the will was made, never had any legitimate child. On the death of the annuitant in 1884 the three children claimed the £400, and the executors, one of whom was the residuary legatee, took out an originating summons to have the point decided. Mr. Justice *Kay* held that the children were not entitled, but gave the costs of all parties out of the £400. The children appealed:—

Held, by *Cotton*, L.J., that the Appellants were not entitled, for that no repugnancy or inconsistency in the will would result from giving to the word "children" its proper sense of legitimate children; that the three children, therefore, were not entitled to the £5 legacies, and whether, if they had been so entitled, the word "children" in the distinct gift in the codicil ought to be construed in the same way as in the will, *quære*.

But *held*, by *Bowen* and *Fry*, L.JJ., that there was enough in the will, as explained by the surrounding circumstances, to shew that the testator used the word "children" in a sense which would apply (whether exclusively or not) to the existing children, and that the word must have a similar interpretation in the codicil, and that the Appellants, therefore, were entitled to the £400:—

Held, that the costs of the proceedings must be borne by the residuary estate.

WILLIAM HASELDINE, on the 10th of August, 1853, married the sister of Mrs. *Lord*, and the wedding took place from

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Mrs. *Lord's* house. Mrs. *Lord* had been married on the previous day. She had at that time three children by Mr. *Lord*, born before her marriage, and never had any other child. These three children lived with their parents, and were treated as if they had been legitimate. Mrs. *Lord* and the children often visited *Haseldine*, and were on very friendly terms with him.

In 1860, *Haseldine*, who was then a childless widower, was seized with paralysis while on a visit to the *Lords*. He remained in their house, and was attended to by them and the three children. In October, 1860, he became worse, and his medical attendants advised him to make his will. He accordingly made a will dated the 7th of October, 1860, by which, after directing payment of his debts and funeral and testamentary expenses, he proceeded:—"I give and bequeath the following legacies or sums of money to the following persons (that is to say)"—here followed a number of pecuniary legacies to persons mentioned by name, including Mr. and Mrs. *Lord;* and then,—"and to each of the children of the said *Mary Ann Lord* the sum of £5 sterling for mourning, the same to be paid into the hands and on the receipt of the said *Mary Ann Lord*, their mother, for them, notwithstanding her coverture and their minority." He then directed his executors to invest £400, and pay the income to a Miss *Slegg* for life. After some specific bequests he gave the residue of his estate to *E. W. Bedford*. He appointed *Grange* and *Bedford* his executors. The testator affixed his mark to the will, being incapacitated by his illness from signing his name.

At this time Mrs. *Lord's* children were aged respectively sixteen, thirteen, and eleven, and she herself was nearly forty-five.

The testator remained with the *Lords* without making any progress towards recovery, and on the 5th of August, 1861, he made a codicil, commencing, "This is a codicil to the last will and testament of me, *William Haseldine*, bearing date the 7th of October, 1860." He gave some specific bequests, and proceeded: "After the decease of *H. C. Slegg*, named in the said will, I give and bequeath the sum of £400 sterling, which by the said will is directed to be invested, and the income or annual produce thereof paid to the said *H. C. Slegg* for her life, and all the stocks, funds, and securities in which the same shall at her decease be

invested, or which shall then represent the same, unto and equally between and amongst all the children who shall be then living of the said *M. A. Lord*, share and share alike, absolutely; or if there shall be only one such child then living, unto such child solely and absolutely; or if there shall be no such child then living, unto and equally between and amongst all the grandchildren (if any) of the said *M. A. Lord* then living, share and share alike, absolutely; and in all other respects I confirm the said will."

The testator died on the 7th of August, 1861, and the will was shortly afterwards proved by the executors, who paid £5 apiece for mourning to Mrs. *Lord's* children. Miss *Slegg* died on the 1st of April, 1884. In March, 1885, the executors took out an originating summons under Order LV., to have it determined whether the children of Mrs. *Lord* could take the £400 under the gift in the codicil. Mr. Justice *Kay* thought the case governed by *Dorin* v. *Dorin* (1), and held that the children were not entitled, but that the £400 fell into the residue. Costs of all parties were given out of the £400. The children appealed.

Maidlow, and *Courthope-Munroe*, for the Appellants:—

The first question is whether these children take the legacies of £5 for mourning. The case is within Prop. 3 of *Wigram* on Extrinsic Evidence (2). The gift is immediate, and the testator, in the state of infirmity in which he was, cannot be supposed to have contemplated that Mrs. *Lord*, who had been married for seven years without having a child by her husband, would have a plurality of future children born in the testator's lifetime. Then the gift is to "the following persons," followed by a list of legacies and legatees, every legacy except the legacies to Mrs. *Lord's* children being a gift to an existing person mentioned by

(1) Law Rep. 7 H. L. 568.

(2) "Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are *insensible with reference to extrinsic circumstances*, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable."

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name. Mrs. *Lord* is referred to in terms which seem to point to her filling the character of mother at the present time. The provision for mourning shews that the testator was contemplating existing children. The nearest case to the present on the facts is *Beachcroft* v. *Beachcroft* (1), and *Hill* v. *Crook* (2) also supports the Appellants' case. The word "children" must receive the same construction in the codicil as in the will: *Hartley* v. *Tribber* (3); *Meredith* v. *Farr* (4); *Evans* v. *Davies* (5); *In re Connor* (6).

Kekewich, Q.C., and *Warlters Horne*, *contrà* :—

The gift in the will is to each of the children of *Mary Ann Lord*. That expression must include any legitimate child of hers living at the testator's death; it would be impossible to shut them out. Now the general rule is that illegitimate children cannot take under a description which applies to legitimate children. Vice-Chancellor *Wigram's* third proposition only applies where the will does not make sense if the illegitimate children are not included, so that it is impossible to exclude them. *Meredith* v. *Farr* lays down no rule, it turned merely on particular expressions in the will; and in the other cases cited illegitimate children were held to be included, because in another gift they had been mentioned as being children. Here there is no mention of the illegitimate children by name in the will, and the cases cited as to construing the codicil by the will do not apply. *Dorin* v. *Dorin* (7) lays down the rule that if the will reads sensibly with the word "legitimate" inserted before "children," you cannot read "children" as applying to illegitimate children. Here the will is sensible if "children" is taken in its proper sense, and there is nothing but conjecture to lead to any other construction.

Maidlow, in reply :—

Dorin v. *Dorin* went on the ground that there was no repugnancy or inaccuracy in the gift if "children" was taken in its proper sense. As to the point that legitimate children could not

(1) 1 Madd. 430, 443.
(2) Law Rep. 6 H. L. 265.
(3) 16 Beav. 510.
(4) 2 Y. & C. Ch. 525.
(5) 7 Hare, 498.
(6) 2 J. & Lat. 456.
(7) Law Rep. 7 H. L. 568.

be excluded, the question is dealt with in *Wilkinson* v. *Adam* (1), where it appears that if you can make out that illegitimate children were intended to take, the fact that the words will include legitimate children is no objection. As to the argument that Vice-Chancellor *Wigram's* third proposition does not apply unless it is impossible to exclude the illegitimate children, it is met by the observations of Lord *Eldon* in *Wilkinson* v. *Adam* (2), which shew that only a high degree of probability is required. That the children should have been mentioned by name in the will as children is not necessary to enable them to take under the codicil, it is enough if they are shewn to be intended to take as children. A bequest to "my nine children" has been held to operate as if they had been named, and not to be a class gift: *In re Stansfield* (3). *In re Bryon* (4) shews that if illegitimate children are recognised in one part of the will, they must be treated as children throughout. In the final clause of the codicil the words "if any" are referable only to grand-children—the testator assumes there being children.

COTTON, L.J.:—

In this case the testator when lying ill of a paralytic stroke made a codicil bequeathing on the death of an annuitant a sum of £400, which by his will he had set apart for securing her life annuity, "unto and equally between and amongst all the children who shall be then living of *M. A. Lord*, share and share alike absolutely," and if only one to such one, and if none then living, amongst the grandchildren of *M. A. Lord*, if any. He had married Mrs. *Lord's* sister, and was in Mrs. *Lord's* house when he made the codicil. She had three illegitimate children, and has not had any legitimate child. The question is whether the illegitimate children can take under this gift. If the question turned on the codicil alone, the point could not be argued, for there is nothing in it to give to "children" any other than its proper meaning of legitimate children. But it is contended that there are expressions in the will which, explained by the surrounding circumstances, shew that the testator intended to benefit the

(1) 1 V. & B. 422, 454.
(2) Ibid. 422, 466.
(3) 15 Ch. D. 84.
(4) 30 Ch. D. 110.

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illegitimate children. When the will was made Mr. and Mrs. *Lord* had been married for some years without having any child of the marriage, but she was at an age which made it not very improbable that she might have legitimate children. By his will the testator says, "I give and bequeath the following legacies or sums of money to the following persons (that is to say);" and then, after giving a number of pecuniary legacies to persons mentioned by name, including Mr. and Mrs. *Lord*, he proceeds, "and to each of the children of the said *M. A. Lord* the sum of £5 sterling for mourning, the same to be paid into the hands and on the receipt of the said *M. A. Lord*, their mother, for them, notwithstanding her coverture and their minority." This, it is said, points with sufficient distinctness to the existing illegitimate children, and the rule laid down by Vice-Chancellor *Wigram*, and various cases were referred to. The rule of Vice-Chancellor *Wigram* is this (1):—[His Lordship read the proposition.] The remark of Lord *Eldon* in *Wilkinson* v. *Adam* (2) that necessary implication means not natural necessity, but so strong a probability of intention that the contrary intention cannot be supposed, was also relied on. The rule on the subject is thus laid down by Lord *Selborne* in *Dorin* v. *Dorin* (3): "It is perfectly well settled, as the law now stands, that the word 'children' in a will means legitimate children, unless, when the facts are ascertained and applied to the words of the will, some repugnancy or inconsistency (and not merely some violation of a moral obligation or of a probable intention) would result from so interpreting them. I find no ground upon which it can be held that any repugnancy or inconsistency would result from giving to the word 'children,' as used in the present will, its ordinary legal sense, and I therefore am compelled to concur in the judgment proposed by my noble and learned friend on the woolsack." Is there anything in the gift of legacies for mourning which produces any repugnancy or inconsistency if "children" is held to have its proper sense? It is true the testator was dangerously ill at the time, but he contemplates giving mourning to all the children living at his death, which might not take place for some time; and though if I had

(1) Wigram, Extrinsic Evidence, Prop. 3.

(2) 1 V. & B. 422, 466.

(3) Law Rep. 7 H. L. 568, 577.

been drawing a will for him, I should not have framed it so as to exclude these children, I should not have drawn it so as to exclude afterborn children. Very young children may go to a funeral, and I cannot say that the words here are rendered insensible by confining them to legitimate children. It was quite possible that legitimate children might be born, so the words might be satisfied without applying them to reputed children. We may think it probable that the testator intended so to apply them, but that is not enough. It is urged that on the words of the will it is clear that the testator was referring to persons then existing and having an existing mother, but this seems to me to be conjecture, and I think that there is not enough in the will to enable us to say that these children took the £5 legacies.

But supposing that the word "children" in the will is to be taken to include these reputed children, I by no means say that the same effect is to be given to it in the codicil which contains a distinct gift. The cases cited were cases where *A. B.* had been described in the will as a child, and therefore was held to be included in a gift to all the children in a codicil. In *Hill* v. *Crook* (1) the testator spoke of two persons as husband and wife, though their marriage was known by him to be invalid, and therefore it was held that when he spoke of their children he meant the children of what he called a marriage. *Dorin* v. *Dorin* (2) was a hard case, where if the Court could have acted on conjecture the illegitimate children certainly would have been allowed to take, but the Court felt compelled to exclude them.

BOWEN, L.J. :—

I have the misfortune to differ from the Lord Justice *Cotton*, and I do so with a deep sense of the probability that he is right. The gift is "to all the children who shall be then living of *M. A. Lord*," and to arrive at its meaning we must interpret the word "children." That word *primâ facie* applies to legitimate children only, and illegitimate children are excluded unless the language of the testator shews that he meant to include them.

(1) Law Rep. 6 H. L. 265. (2) Law Rep. 7 H. L. 568.

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The rule is laid down in *Hill* v. *Crook* (1) that "where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its *primâ facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children," the Court will hold them included. Now to construe the will, the Court is entitled to use the circumstances which surrounded the testator, not for the purpose of speculating as to what his intention was, but for the purpose of throwing light upon the true meaning of his words. Thus in *Dorin* v. *Dorin* (2), Lord *Hatherley* says: "The only mode in which the word 'children' can be made to bear a different sense from that which is its first legal and natural sense is this, that if you look to the outward circumstances as well as to the expressions contained in the will, and find that the outward circumstances of the case, combined with the expressions contained in the will, fail to give any adequate or intelligible sense to the will, then you have at once to arrive at the conclusion that the word 'children' has been used in some other or different sense." Lord *Cairns* says (3): "I feel myself bound to ask whether, with a knowledge of the position, and what are called the surrounding circumstances, at the time the testator made his will, there is anything upon the face of the will which enables me to say that those who in the eye of the law were not his children, were intended by him to take under the general expressions used in his will;" and Lord *Selborne* says (4) that the word "children" in a will means legitimate children, unless when the facts are ascertained and applied to the words of the will some repugnancy or inconsistency would result from so interpreting them. Now what are the facts here? The testator was a little over fifty years of age, and was struck down by paralysis, so that he could not sign his name. He was lying in the house of his sister-in-law, who had three illegitimate children by her husband born before their marriage, and aged respectively sixteen, thirteen, and eleven. The testator knew them well, they

(1) Law Rep. 6 H. L. 283.
(2) Ibid. 7 H. L. 568, 575.
(3) Law Rep. 7 H. L. 573.
(4) Ibid. 577.

had helped in nursing him, and he felt affection for them. He begins his will by giving legacies as follows:—"I give and bequeath the following legacies or sums of money to the following persons (that is to say);" then after legacies of different amounts to various persons by name, he proceeds, "and to each of the children of the said *Mary Ann Lord* the sum of £5 sterling for mourning, the same to be paid into the hands and upon the receipt of the said *M. A. Lord*, their mother, for them, notwithstanding her coverture and their minority." He signed this will with his mark. To whom did this man so struck down by paralysis intend to apply the term "children"? There was no child legitimate or illegitimate beside these three. It appears to me that he assumes that the legatees will be living at his decease. I think he believed that he was giving to those who would be living at his decease, and that he believed his decease to be imminent. His language as to payment to their mother and as to their minority shews that he was contemplating their being so far under age that the money should be paid to their mother rather than to them. Above all, his language shews that he thought his death near at hand. What follows from this? That the testator believed the children to be then living whom he considered to be the recipients of his bounty, and if I were driven to express a final opinion on the point I should say that not impossibly he meant a gift to these very children as *personæ designatæ*. Mr. *Kekewich* pressed upon us however that if any legitimate children had been born before the testator's death they could not have been excluded. If that be so, it would only prove at most that the gift was not to the illegitimate children as *personæ designatæ*, it would not prove that the word "children" was not used in a sense which would include the illegitimate children. We should have to choose between a class of legitimate children and a class consisting of the legitimate and illegitimate children, and in that case the considerations to which I have pointed appear to me decisive in favour of the latter. We then come to the gift in the codicil, and the question is whether the same sense is not to be given to the word "children" in it as in the will. If it had stood by itself, unquestionably legitimate children only could have taken under it, for the external facts

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could not have controlled the plain words. But this is a codicil executed during the same illness, and I think that he is not to be taken to have intended to exclude from it those who were treated as children by his will. I think, therefore, that the illegitimate children cannot be excluded.

FRY, L.J.:—

The first question here is on the construction of the will. The testator, after directing payment of his debts and funeral and testamentary expenses, proceeds—"I give and bequeath the following legacies or sums of money to the following persons (that is to say);" then follow legacies to a number of persons all mentioned by name, and the list ends with, "and to each of the children of the said *Mary Ann Lord* the sum of £5 for mourning, the same to be paid into the hands and on the receipt of the said *Mary Ann Lord*, their mother, for them, notwithstanding her coverture and their minority." To my mind this, on its true construction, is a gift to existing persons. The legacy is one of a series of bequests to existing persons. The definite article is used in speaking of these children, and there is no reason for its use except to point to existing children. If the testator had intended to refer to children whether existing or not, he would probably have used the words "each or every child." Mrs. *Lord* had three existing children, and he expresses himself in a way which assumes the fact of there being several children. He speaks moreover of the coverture of the mother and the infancy of the legatees as existing facts. A gift for mourning also was more likely to be made to these children whom he knew, than to children who might never come into existence, and who, if they did, would almost certainly be infants of tender years at his death. I think, therefore, that there is enough to shew that the testator referred, whether exclusively or not, to the existing children. The language used appears to me to be insensible if "children" be taken in its strict primary sense, but sensible if we understand the word as used in its secondary sense.

The question, then, is how far this affects the construction of the codicil. Now the testator manifestly intends the codicil to be considered as part of the same instrument as the will, for he calls

it a codicil to his will, and confirms his will except as altered by it. I think that he has by his will said in substance, "The three children who are living with *Mary Ann Lord* are to be considered her children for the purposes of my will," and I think that this direction must apply to the codicil, which is, in fact, incorporated with the will. I agree therefore with Lord Justice *Bowen* in thinking that this appeal must be allowed, though I share the doubt and distrust which he feels in consequence of the dissent of Lord Justice *Cotton*.

Maidlow asked for costs out of the residuary estate, the executors and the residuary legatee being before the Court. The residue was admitted to be considerable.

Kekewich, Q.C., submitted that, as the Court was not administering the estate, the costs should be borne by the fund, and said it was of great importance that the question how the costs of an originating summons relating only to a particular fund ought to be borne, should be settled.

THE COURT directed the costs, both above and below, to be paid out of the residuary estate.

Solicitors for Plaintiffs: *Reep, Lane, & Co.*
Solicitors for Appellants: *J. R. Chidley & Co.*

H. C. J.

C. A. 1886 Feb. 1.

In re WILSON, a Lunatic.

Practice—New Trustees—Petition for Appointment of—Dispensing with Service—Verification of Consent of Trustee to act—Rules of Supreme Court, December, 1885, *Order* XXXVIII., *r.* 19 *a.*

The persons entitled to the residuary estate of a testator presented a petition for appointment of new trustees of his will in the place of the original trustees, one of whom had died, and the other was a lunatic. The petition was served on three of the four persons who were entitled to the proceeds of sale of a real estate devised on trusts for persons who took no interest in the residue, but the fourth was resident in *Australia*, and was not served:—

Held, that service on the *cestui que trust* in *Australia* might be dispensed with.

The signature of a new trustee to his consent to act must in Lunacy be verified by affidavit according to the old practice; the Order XXXVIII., r. 19 a, not applying to proceedings in Lunacy.

JAMES GREEN, by will dated the 21st of June, 1873, devised a messuage to his wife for her life, and after her decease to his trustees, *John Joseph Wilson* and *Thomas Wilson*, upon trusts for the benefit of the five children therein named of *Edwin Nicholls*, the ultimate trust being to sell the property and divide the proceeds in fifths among the five children, with a proviso giving over the shares of any who died under twenty-one to their issue on attaining twenty-one, and, if none, then to the surviving brothers and sisters. He gave his residuary estate to the same trustees upon trust to pay certain legacies, and divide the net residue between the children of his brother, *John Green*. The trustees were appointed executors.

The testator died in 1874. *J. J. Wilson* proved the will and acted in the trusts, but *Thomas Wilson*, who was of unsound mind, did not. *J. J. Wilson* died in 1885. The residue had not been fully administered, and part of it consisted of a mortgage made to the testator. The widow was still living. One of the five children of *Edwin Nicholls* had died under twenty-one without issue, but the other four were living. One of them had married, and was living with her husband in *Australia*.

The children of *John Green* presented a petition in Lunacy and

in Chancery for the appointment of two specified persons to be new trustees, in the place of the two *Wilsons*, and for an order vesting the trust property in the new trustees. The petition was served on the three children of *Edwin Nicholls*, who were in *England*. The consent of the new trustees to act had been verified by the signature of their solicitor, and not by affidavit: Order XXXVIII., rule 19 a (December 1885).

G. T. J. Millar, for the Petitioner, asked that the service on the daughter of *E. Nicholls* who was in *Australia* might be dispensed with: *In re Lightbody's Trusts* (before Mr. Justice *Kay*, December 19th, 1884); *Re Blanchard* (1). He also called the attention of the Court to the mode in which the consent to act had been verified.

LINDLEY, L.J.:—

We think that service on the *cestui que trust* in *Australia* may properly be dispensed with. As to the verification of the consent to act, the Order XXXVIII., rule 19 a, does not apply to proceedings in Lunacy, and the signature to the consent must be verified by affidavit according to the old practice.

FRY, L.J., concurred.

Solicitors: *Smiles, Binyon, & Ollard.*

(1) 3 D. F. & J. 131, 137.

H. C. J.

C. A.
1886
Jan. 30;
Feb. 1.

NICOL *v.* NICOL.

[1884 N. 588.]

Husband and Wife—Separation Agreement—Judicial Separation—Reconciliation—20 & 21 Vict. c. 85, s. 25 [Revised Ed. Statutes, vol. xiii., p. 254].

A husband and wife, when before the Divorce Court, made an agreement in writing that if judicial separation were decreed, the wife should be permitted to enjoy during her life certain furniture; but that if she annoyed her husband her enjoyment of it should cease. Judicial separation was decreed, and the wife took possession of the furniture. The husband and wife afterwards resumed cohabitation:—

Held (affirming decision of *North*, J.), in an action by the wife to recover the furniture, that the agreement came to an end when cohabitation was resumed; and that as the wife was entitled to the furniture during separation only, she took nothing under the 20 & 21 Vict. c. 85, s. 25, which relates to property acquired by a wife during separation.

Dictum in *Randle* v. *Gould* (1) questioned.

THIS was an appeal from a judgment of Mr. Justice *North* (2).

Mr. *Nicol* commenced an action against his wife in the Divorce Court for a judicial separation on the ground of her cruelty. The suit came on for hearing on the 26th of February, 1880. Before the trial was concluded the following written agreement was signed by Mr. and Mrs. *Nicol*:—

"Order for jury discharged. Case to be tried before the Judge. If judicial separation decreed, following terms to be agreed upon:—Mrs. *Nicol* to be permitted to enjoy during her life the use of all furniture and all the articles of every kind and description now in No. 7, *Chichester Terrace, Brighton*, with full right to remove the same elsewhere in *Great Britain*. After her death same to revert to Mr. *Nicol* or his personal representatives. Inventory of such articles to be taken by some person to be named by ——. Mrs. *Nicol* to be at liberty, if she think fit, to continue to occupy No. 7, *Chichester Terrace*, on terms of lease, she being liable as tenant. If she determine to quit the house, to be at liberty to do so on giving Mr. *Nicol* two months' notice within

(1) 8 E. & B. 457. (2) 30 Ch. D. 143.

six months from this date. The right of Mrs. *Nicol* to enjoy the furniture and articles as above to be subject to the condition that she is not to interfere with or annoy Mr. *Nicol;* in the event of her so doing, her right to enjoy the use of same to cease."

After the decree the furniture and other articles, which were at the date of the agreement the property of Mr. *Nicol,* were placed in the possession of Mrs. *Nicol,* who afterwards removed them to another house. In March, 1881, a petition in Lunacy was presented, under which Mrs. *Nicol* was duly found a lunatic, and was removed to a private asylum. In February, 1883, Mrs. *Nicol* went to reside with her husband under the care of an attendant. On the 12th of June, 1883, the inquisition of lunacy was superseded, and Mrs. *Nicol* continued to reside with her husband till the end of July, when Mrs. *Nicol* met with a severe accident, which rendered it necessary for her to be placed under medical treatment at a distance from home. After that time she never returned to her husband.

Mr. *Nicol* had in the meantime taken possession of the furniture and other articles, and Mrs. *Nicol* brought this action to recover possession of them. Mr. Justice *North* having decided that there had been a reconciliation and renewal of cohabitation, and that the agreement respecting the furniture ceased on the reconciliation, Mrs. *Nicol* appealed.

Hilbery, for the Appellant:—

The agreement was independent of the decree for judicial separation, and it did not fail even though the separation came to an end through a return to cohabitation. Under the agreement the gift of the furniture to Mrs. *Nicol* was absolute and unconditional during her life: there is no allusion to its ceasing on reconciliation. It was, in fact, a post-nuptial settlement on the wife. There are several cases in which provisions for the wife's benefit in separation deeds were held to be absolute: *Negus* v. *Forster* (1); *Randle* v. *Gould* (2); *Crouch* v. *Waller* (3); *Charlesworth* v. *Holt* (4); *Bateman* v. *Countess of Ross* (5); *Webster* v.

(1) 30 W. R. 671; 46 L. T. (N.S.) 675.
(2) 8 E. & B. 457.
(3) 4 De G. & J. 302.
(4) Law Rep. 9 Ex. 38.
(5) 1 Dow. 235.

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Webster (1); *Gandy* v. *Gandy* (2). The gift being an absolute one, it did not become divested by the ceasing of the judicial separation, but falls under the enactment in the *Divorce Act* (20 & 21 Vict. c. 85, s. 25).

But in the present case there is no sufficient evidence of reconciliation. Mrs. *Nicol* was taken back to her husband's house while she was a lunatic, and after the supersedeas she resided with him for a very short time.

Barber, Q.C., and *Hadley*, for Mr. *Nicol*, were not called on.

COTTON, L.J. (after stating the facts of the case, continued):—

Two points arise on the present appeal. First, has there been a reconciliation and cohabitation between the husband and wife? and secondly, if there has been, what effect has this on the agreement between them?

We have the authority of Lord *Eldon*, in *Bateman* v. *Countess of Ross* (3), that cohabitation and reconciliation put an end to all the effects of separation. This is the general principle; but it has been contended in this case by the Appellant that the agreement is to be looked on as a post-nuptial settlement on the wife, and is not affected by the fact of the separation coming to an end, but lasts till the death of the wife. This depends on the construction of the agreement. It was made in the course of an action for judicial separation, and was to depend on a judgment for judicial separation being given. [His Lordship stated the terms of the agreement as given above, and continued:—] It was contended that the usual rule applicable to agreements for separation—namely, that there is an implied condition that they shall come to an end in case of reconciliation, does not apply here, because there was an express provision as to circumstances and events on which the wife was to cease to enjoy the furniture which she was otherwise to have during her life, and that this excludes the idea of her enjoyment being limited to the period of separation. But I think this view is erroneous. The whole agreement is simply and entirely applicable to the separation, and the provisions respecting the wife's use of the furniture are

(1) 4 D. M. & G. 437. (2) 7 P. D. 168. (3) 1 Dow. 235.

inconsistent with the state of things which would arise if the separation came to an end, and the parties lived together again as husband and wife. In taking this view we are not introducing a new provision into the agreement, but deciding that the whole thing came to an end when separation ended. Taking it independently of authority, I consider that the agreement merely provided for the separation while it continued, and was not a post-nuptial settlement for the wife during her life, and that the expression respecting the enjoyment by the wife during her life was to guard against its being supposed that she had any greater interest given to her. It is said that as the gift of the furniture was complete, she could not now be deprived of it. But that is a mere question of words. It may be that in an agreement like this a completed gift of a sum of money might continue unaffected after a reconciliation, having regard to the provisions of the *Divorce Act* (20 & 21 Vict. c. 85). But here the gift was only complete by way of contract, and was limited to the term of her life.

Various cases have been cited to us, of which it is useless to consider those which only lay down that a separation deed may be so made as not to depend on the continuance of the separation, but to remain binding if the parties come together again. But some cases have also been cited in support of the construction which it is sought to put on this agreement, namely, that its provisions are such as to exclude the general rule, and to continue the wife's rights after the end of the separation.

The first case I shall refer to is *Randle* v. *Gould* (1). There was an express agreement in that case that the provision for the wife was to come to an end in the event of the parties agreeing in writing to return to cohabitation, and it was held that as there was a condition respecting the kind of reconciliation which should put an end to the agreement, it excluded the contention that a different kind of reconciliation would have that effect. Undoubtedly there was a *dictum* of Lord *Campbell*, who delivered the judgment of the Court, to the effect that even if there had been no such express proviso he could not have held that there was an implied condition that the agreement should be avoided

(1) 8 E. & B. 457.

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by reconciliation and renewed cohabitation. I doubt whether I should have agreed with the *dictum*. At all events it is not a decision governing the present case.

In *Crouch* v. *Waller* (1) there were two deeds, one of which contained an express proviso that it was to be void in case of a renewal of cohabitation, and it was contended that the other deed was avoided also by reconciliation, but it was held that inasmuch as that deed contained a provision for future children of the marriage it must be treated as a post-nuptial settlement which did not come to an end on the termination of the separation. It is true that *Randle* v. *Gould* (2) was referred to by the Lord Chancellor in that case without disapproval; I think it will therefore be right for me to express my disapproval of the *dictum* of Lord *Campbell* in *Randle* v. *Gould*, lest it should be said hereafter that it was approved of by this Court.

Then there was the case of *Charlesworth* v. *Holt* (3), but that has no bearing upon the present question. In that case it was held that a subsequent divorce dissolving the marriage did not put an end to the wife's rights under a separation deed.

The decision most favourable to the Appellant's case is *Negus* v. *Forster* (4). Undoubtedly it was there held that the provisions in a separation deed for the wife's benefit continued though the separation was at an end. But there was no principle there laid down which can bind us to come to any conclusion different from that which I have stated, namely, that this case falls within the general rule. The agreement was made expressly subject to the decree for judicial separation being pronounced. Is it conceivable that it was not intended to be dependent on the continuance of the separation? I am of opinion that if it is shewn that there was such a reconciliation as put an end to the separation the Appellant must fail.

[His Lordship then referred to the evidence on this point, and said that he had come to the conclusion that it justified the finding of the Judge in the Court below that there had been a reconciliation and renewal of cohabitation between Mr. and Mrs. *Nicol*. The appeal was therefore dismissed.]

(1) 4 D. G. & J. 302.
(2) 8 E. & B. 457.
(3) Law Rep. 9 Ex. 38.
(4) 30 W. R. 671; 46 L. T. (N.S.) 675.

BOWEN, L.J. :—

I am of the same opinion. The first question is as to the true construction of this agreement, and the principle of law to be applied thereto. I think that the true principle is that a renewal of cohabitation will put an end to all or any of the provisions of a separation deed, so far as the language of the deed, properly construed by the light of surrounding circumstances, shews that its provisions were only intended to take effect whilst the separation lasted. The language of Lord *Eldon* in *Bateman* v. *Countess of Ross* (1) goes a little further, and suggests that we ought to hold that there exists a presumption that a separation deed is intended to end on a reconciliation. But that view was not adopted by the Court in *Randle* v. *Gould* (2), and I am not myself in favour of applying presumption to the construction of written documents, in such a way as to dictate the inference to be drawn from the varying circumstances under which deeds are drawn, which must necessarily differ in different cases. Separation deeds are often very complicated, and some provisions may be intended to apply even in the case of a reconciliation, while others may be quite inapplicable to such a state of things, and I should prefer to construe each deed by the light of its surrounding facts rather than to lay down a crystalized rule. I think we can decide most cases by the terms of the deed itself. All cases decided on deeds differently expressed from the present are therefore not of binding authority in this case. *Randle* v. *Gould* turned on the special terms of the document, although the Court did say that their decision would have been the same if there had been no such special provisions in the deed ; but this was merely a *dictum* in which I feel it difficult to acquiesce. In *Crouch* v. *Waller* (3) also there were special provisions in the deed, and the same remark applies to *Negus* v. *Forster* (4). Whether I should have put the same construction on the particular deed in that case as the Court did is beside the point, for there is nothing in the law there laid down which conflicts with our present decision.

I come therefore with confidence to the document on the construction of which the present case depends. We have to find

(1) 1 Dow. 235.
(2) 8 E. & B. 457.
(3) 4 D. G. & J. 302.
(4) 30 W. R. 671; 46 L. T. (N.S.) 675.

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out what the parties really meant. There is one fact which distinguishes this agreement from an ordinary settlement, namely, that it was made in a suit for judicial separation and was not intended to come into effect unless a decree was pronounced. Looking at that fact, it is clear that there was no absolute gift of this furniture to the wife, but only a license, irrevocable, because given for valuable consideration, for her to enjoy it during her life. Ought we to imply a condition limiting this enjoyment to the duration of the separation? The subject-matter to be enjoyed was the furniture in a particular house, with the right to remove it to another house. Then there was a condition that her enjoyment was to cease if she annoyed her husband. Looking at the whole agreement, I cannot doubt that the license was only to operate on an implied condition that the separation lasted, and that if the separation ceased it was to come to an end. The enjoyment was to depend on a decree being pronounced, and was to last only so long as it continued in effect. If this be so, the wife's interest in the furniture cannot be preserved to her by sect. 25 of the 20 & 21 Vict. c. 85, because all her property in it ceased as soon as the separation came to an end. On the question of fact that a reconciliation took place between the husband and wife, I agree with the view of Lord Justice *Cotton*.

FRY, L.J.:—

The question here is whether the terms of the agreement of the 26th of February, 1880, amount simply to an agreement under which provision was made for the wife during the continuance of the separation, or one by which it was intended to confer on her some property, or irrevocable license, or other benefit, to endure whether the separation came to an end or not. I conceive it to be plain that the parties to a separation deed may agree that it shall continue to operate whether there be a return to cohabitation or not, so that the deed will amount in fact to a post-nuptial settlement. The question for inquiry in each case is whether that is the true effect of the document. All the cases that have been cited proceed upon this view. In *Randle* v. *Gould* (1) the Court considered that the deed in that case was

(1) 8 E. & B. 457.

not merely a separation deed but a post-nuptial settlement. The Court there said that if the deed had contained no such special proviso as it did contain, their decision would have been the same; but that expression of opinion, whether correct or not, is immaterial in this case. So in *Negus* v. *Forster* (1) the question considered by the Court was the same, namely, whether the deed was a separation deed and nothing more, or was a post-nuptial settlement. The answer in each case must depend upon the construction of the particular instrument, and the cited cases are for the most part immaterial because they depend upon different instruments.

When we look at the agreement in this case, we find that it begins by saying: "If judicial separation decreed, following terms to be agreed upon." So that, so far from its being independent of a separation, no part of it was to take effect unless there was a decree for separation. The provision that the wife was to enjoy the furniture during her life was relied on: but the clauses which follow respecting the wife occupying the house on terms of lease, and being liable as tenant, and being allowed to quit the house on two months' notice to Mr. *Nicol*, are totally inconsistent with their living together in the same house as husband and wife. Again it was provided that the enjoyment of the furniture should cease if she interfered with or annoyed her husband. It is obvious that this could only apply to them while they were living separate. The intention of the parties on the whole instrument seems to me perfectly clear, that the agreement was in respect of and contingent upon their separation, and only to last during the separation, and was not in any way intended as a settlement on the wife independently of the separation. We have been pressed with the words "during her life," but I think that those words were intended to limit, not to enlarge, the wife's right of enjoyment.

On the question of fact I have nothing to add. I agree that there is distinct evidence of a reconciliation.

It was contended that under the 20 & 21 Vict. c. 85, s. 25, the furniture became the property of the wife to her separate use.

(1) 30 W. R. 671; 46 L. T. (N.S.) 675.

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On this point also I agree with the other Lords Justices that there was nothing on which the section could operate. The appeal must be dismissed with costs.

Solicitors: *Campbell, Reeves & Hooper; Tyrrell Lewis & Co.*

M. W.

C. A. 1885 V.-C. B. *Nov.* 27. C. A. 1886 *Feb.* 3, 4.

In re GLANVILL. ELLIS *v.* JOHNSON.

[1882 G. 954.]

Practice—Costs—Next Friend—Married Woman—Restraint on Anticipation—Order against Separate Estate.

A married woman, by her next friend, having brought in 1882 an action for administration of a trust fund, to the income of which she was entitled for her separate use without power of anticipation, the Court, on further consideration in 1884, held the action to have been unnecessary and improper, and the next friend was ordered to pay the Defendants' costs.

The Defendants being unable to find the next friend, an order was made by Vice-Chancellor *Bacon* giving the trustees liberty to retain the costs out of the income of the trust fund already due and to become due to the married woman.

Held, on appeal, that no such order could be made, for that the Court has no jurisdiction to disregard the restraint on anticipation on the ground that it appears to the Court to be just to do so; and that no income which did not accrue due till after the act on which the claim against the separate estate depended, viz. the improper institution of the suit, could be attached to meet the costs.

Whether, if the Plaintiff had been suing under the *Married Women's Property Act*, 1882, without a next friend, the order could have been supported, *quære*.

In re Andrews (1) observed upon.

The appeal being allowed with costs, *held*, that the costs must be set off against the costs which the next friend had been ordered to pay, although the notice of appeal did not purport to be given through the next friend, for that so long as he remained on the record as next friend the proceedings on behalf of the Plaintiff must be taken as carried on by him.

JOHN GLANVILL died in 1874, leaving a will by which he directed the Defendants, his executors and trustees, to stand possessed of one moiety of the trust fund arising from his residuary estate upon trust to pay the income thereof "as the same

(1) 30 Ch. D. 159.

should become receivable, and not by way of anticipation," to his granddaughter, the Plaintiff, *Eva Ellis*, the wife of the Defendant, *John Phillip Ellis*, during her life, for her separate use, "without power of alienation, as a strictly personal provision," and after her death upon trusts for her children.

On the 15th of April, 1882, Mrs. *Ellis*, by her next friend, brought this action against the trustees and her husband to have the trusts of the will carried into execution, and the usual administration judgment was pronounced on the 7th of April, 1883.

By the order on further consideration, dated the 19th of May, 1884, the Court being of opinion that the action was unnecessary and improper, the costs of the Defendants, the trustees and executors, of the action, were ordered to be taxed and paid by the next friend, and liberty was given to the Defendants to apply at Chambers with reference to the payment out of the share of the Plaintiff, or otherwise, of any costs not recovered from the next friend.

The Defendants had their costs taxed at £170 10*s.* 10*d.*, but being unable to find the address of the next friend, who was a person in a humble position of life, or to obtain any information respecting him, they took out this summons asking that the £170 10*s.* 10*d.* might be provided for out of a sum in their hands representing income, and other the income from time to time payable to the Plaintiff, *Eva Ellis*, under the trusts of the will, and that they might be at liberty to retain such income as it became due and payable to her until the costs were paid. The summons was adjourned into Court, and heard on the 27th of November, 1885.

Chadwyck Healey, for the Defendants:—

A married woman is liable for costs to the extent of her separate estate, if her next friend cannot pay: *Barlee* v. *Barlee* (1); *Hogan* v. *Morgan* (2); *Morgan* and *Wurtzburg* on Costs (3). The restraint on anticipation does not prevent the Court from authorizing the trustees to retain their costs out of the married woman's income: *In re Andrews* (4), before *Pearson*, J.

(1) 1 S. & S. 100.
(2) 1 Hog. 250.
(3) Page 364.
(4) 30 Ch. D. 159.

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Russell Roberts, for the Plaintiff:—

Had there been no restraint on anticipation, I admit the order would have been of course; but it is contrary to the well-established practice of the Court to break through a restraint on anticipation. In *Moore* v. *Moore* (1) a married woman's separate estate was protected from costs on the ground of her being restrained from anticipation. In *Stanley* v. *Stanley* (2), although there was actual fraud on the part of the wife, *Malins*, V.C., refused to charge her separate income, saying that "in no case and by no device whatever can the restraint upon anticipation be evaded." In *Claydon* v. *Finch* (3) your Lordship held that, there being a restraint, only income already due, not future income, could be charged. In *Barlee* v. *Barlee* (4) and *Hogan* v. *Morgan* (5) there was no restraint.

In re Andrews (6) stands by itself: no authorities were cited, and the principles on which the Court acts in such cases, as laid down by Lord *Cranworth* in *Robinson* v. *Wheelwright* (7), appear to have been overlooked.

BACON, V.C.:—

I do not think that any of the cases which have been cited apply to the case before me. When a married woman is entitled to income for her separate use with a restraint on anticipation, neither by fair means nor foul can she get rid of that fetter. But that does not mean that her property shall not, if possible, be made answerable for her misconduct.

I am not bound by the decision of Mr. Justice *Pearson*, but I willingly concur in it, and think he made the proper order, and I now make the order asked for here.

I am not breaking through the restraint on anticipation; on the contrary, I am enforcing it by preventing the married woman from receiving her income until it becomes due.

G. I. F. C.

(1) 1 Coll. 54.
(2) 7 Ch. D. 589.
(3) Law Rep. 15 Eq. 266.
(4) 1 S. & S. 100.
(5) 1 Hog. 250.
(6) 30 Ch. D. 159.
(7) 6 D. M. & G. 535, 545.

An order was accordingly made that the £170 10*s.* 10*d.*, or such part thereof as the next friend should be unable to pay, should be provided for out of the balance representing income of the testator's estate in the hands of the trustees, and other the income from time to time payable to the Plaintiff by the trustees, and that the trustees should be at liberty to retain such income as it became due and payable to the Plaintiff until such costs as aforesaid were fully paid and satisfied, and also the trustees' costs of the application.

The Plaintiff appealed from this order, not mentioning the next friend except that his name appeared in the title of the action. The appeal was argued on the 3rd of February, 1886.

Russell Roberts, for the Appellant:—

The Vice-Chancellor decided on the authority of *In re Andrews* (1).

[FRY, L.J.:—May not that decision have proceeded on the construction of the *Married Women's Property Act*, 1882?]

It may have done so, though the report does not shew it. If it does so proceed, it is no authority in the present case. The Court cannot get rid of the restraint on anticipation, it must carry out the lawful intention of the settlor. A married woman can by no means whatever bind beforehand her separate estate which she is restrained from anticipating. Even fraudulent conduct on her part will not have that effect: *Jackson* v. *Hobhouse* (2); and in *Arnold* v. *Woodhams* (3) Vice-Chancellor *Malins* treats the law as settled on that footing. *Robinson* v. *Wheelwright* (4) shews how powerless the Court is to assist a married woman in getting rid of the restraint.

[He was then stopped by the Court.]

Chadwyck Healey, for the trustees:—

We support this decision in the interest of the remaindermen. If the Plaintiff's life interest cannot be made liable, how are the trustees to get their costs at all? The payment of them must affect the married woman's income.

(1) 30 Ch. D. 159.
(2) 2 Mer. 483.
(3) Law Rep. 16 Eq. 29.
(4) 6 D. M. & G. 535.

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[COTTON, L.J.:—The lien of the trustees for their costs affects the whole estate, and the married woman takes only the income of what remains after payment of all charges on the corpus.]

In that way injustice will be done, for part of the costs will fall on other shares of the estate. I submit that the Court can disregard the restraint on anticipation as the Vice-Chancellor has done. The restraint on anticipation was invented by Lord *Thurlow* in order to prevent the mischief arising from marital influence, and this principle runs through all the cases. In *Jackson* v. *Hobhouse* (1) Lord *Eldon* says, that to allow fraud by a married woman to do away with the restraint on anticipation, would be a temptation to husbands to induce their wives to commit frauds. So if *Robinson* v. *Wheelwright* (2) had been decided the other way, the married woman might have accepted property of which her husband could lay hold. This principle will not make the restraint protect her separate estate from the costs of wrongful litigation. In *Fleming* v. *Armstrong* (3) the Court charged the costs of a married woman on property settled to her separate use without power of anticipation. In *In re Keane* (4) property so settled was charged with costs.

[FRY, L.J.:—The Vice-Chancellor thought the statute 23 & 24 Vict. c. 127, s. 28, authorized it. That Act has no application here.]

In *Moore* v. *Moore* (5) costs were refused, but there the contest arose in respect of a voluntary attempt at alienation. In *D'Oechsner* v. *Scott* (6) the trustees had their costs out of income subject to a restraint on anticipation. At all events, the arrears of income can be attached: *Claydon* v. *Finch* (7).

Russell Roberts, in reply:—

The costs were incurred before the arrears of income became due, and any order for payment of them out of the arrears would therefore be anticipation. *Pike* v. *Fitzgibbon* (8) is opposed to the contention of the trustees.

(1) 2 Mer. 483.
(2) 6 D. M. & G. 535.
(3) 34 Beav. 109.
(4) Law Rep. 12 Eq. 115.
(5) 1 Coll. 54.
(6) 24 Beav. 239.
(7) Law Rep. 15 Eq. 266.
(8) 17 Ch. D. 454.

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1886. Feb. 4. COTTON, L.J.:—

A married woman, entitled under a will to a life estate for her separate use with a restraint on anticipation, sued by her next friend to have the trusts of the will carried into execution. On further consideration the suit was held to be useless and improper, and the next friend was ordered to pay the costs of the Defendants. The next friend could not be found, and Vice-Chancellor *Bacon*, following a decision of Mr. Justice *Pearson*, ordered that the costs should be retained out of the income which had already accrued to the Plaintiff, and out of her future income. I am not sure whether Mr. Justice *Pearson* intended to decide *In re Andrews* (1) under the *Married Women's Property Act*, 1882, but whether that Act will support his order or not, the Act has no bearing on the present case, for it has not been resorted to, the suit having been commenced before the Act, and the married woman suing according to the old practice by her next friend. The order under appeal affects not only the arrears of income but the future income of the Plaintiff, and the question is whether it is right. The position of a married woman restrained from anticipation is very peculiar. The restraint was introduced by the Court of Chancery to prevent married women from using to their own prejudice the power of disposition given them by limitations to their separate use. Although the position and rights of a married woman to whom property is given for her separate use with a restraint on anticipation are anomalous, inasmuch as a man cannot be placed in a similar position, still Lord *Eldon*, Lord *Hatherley*, and other Judges have said that the restraint on anticipation must have full effect given to it for the protection of a married woman, and that even where she has been guilty of fraud she will not be deprived of that protection. In *Arnold* v. *Woodhams* (2) we have the opinion of three Judges included in one sentence. "It is said that the rule laid down by Lord *Eldon* in *Jackson* v. *Hobhouse* (3) has been modified by recent decisions, and will not now be supported where the lady herself was the settlor; but in *Clive* v. *Carew* (4) this was the case, and that did not prevent Vice-Chancellor *Wood* from following *Jackson* v.

(1) 30 Ch. D. 159.
(2) Law Rep. 16 Eq. 29, 33.
(3) 2 Mer. 483.
(4) 1 J. & H. 199, 206.

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Hobhouse (1). I think his decision applies entirely to the present case; and I agree with the view he expressed, that 'upon the whole, it is the sounder course to adhere to the view taken by Lord *Eldon* in *Jackson* v. *Hobhouse*, namely, that, having once sanctioned this species of protection to a married woman by making it impossible for her in any way whatever to deal with the fund, the Court . . . must go on to hold her interest in the fund protected even against her own fraudulent acts.'" If a married woman restrained from anticipation cannot even in a case of fraud give by contract a right against the separate estate which she is restrained from anticipating, she cannot give a right against it by the institution of a suit. I am of opinion, therefore, that the order laying hold of the Plaintiff's future income is wrong.

As regards the cases which have been referred to, *In re Keane* (2) turned not on the general law, but on the statute 23 & 24 Vict. c. 127, s. 28, which gives a solicitor a lien on property recovered or preserved by his instrumentality, and the Vice-Chancellor came to the conclusion on the construction of that section that it overrode the restraint on anticipation. In *D'Oechsner* v. *Scott* (3) Lord *Romilly*, in giving the relief he did to the trustees, relied on the terms of the settlement in that case, which went beyond the usual terms in favour of the trustees. *Claydon* v. *Finch* (4) has no bearing on the claim against future income, the sequestrators were enabled only to lay hold of the arrears which were due at the time of their appointment. These authorities contain nothing at variance with the view we take of the case. The expressions of Mr. Justice *Pearson*, if they are not intended to be confined to a case to which the *Married Women's Property Act*, 1882, is applicable, lay down a rule with which I cannot agree.

With deference to the learned Judge, I do not think that the Court has any power to take away from a married woman the protection arising from the restraint on anticipation in any case in which it thinks her not entitled to it. If anything could disentitle her to it, fraud would do so, and it has been decided that

(1) 2 Mer. 483.
(2) Law Rep. 12 Eq. 115.
(3) 24 Beav. 239.
(4) Law Rep. 15 Eq. 266.

fraud will not. I think that the decision in that case cannot be supported unless his Lordship came to his conclusion in consequence of the terms of the *Married Women's Property Act*, and there is nothing in his judgment to shew that he did. Whether it can be supported on the ground of that Act I give no opinion.

As regards past income, I do not think that the protection extends to that, and I am of opinion that the Court can interfere with income which has accrued due before the act on which the title of the assignee depends. In the present case the only income now due has accrued since the order on further consideration, and the act on which the claim for costs depends was done once for all when the Plaintiff induced an insolvent next friend to institute an improper suit on her behalf. The existing order therefore applies only to what was future income when the act on which the claim against it depends was done, and therefore cannot be sustained. The appeal must be allowed with costs.

BOWEN, L.J.:—

I am of the same opinion. I think that the powers of the Court as to future instalments of the income and as to instalments which have already fallen due since the commencement of the action stand on the same footing. The action was commenced before the *Married Women's Property Act*, 1882. What is the foundation of this order? The only act of the married woman which can be relied upon as giving the Court jurisdiction to make it, is the commencing this action. Now the general principle recognised in *Pike* v. *Fitzgibbon* (1) is that a married woman can in no way dispose by way of anticipation of property given to her for her separate use with a restraint on anticipation. She cannot dispose of it by making an engagement authorizing another person to intercept it; she cannot do so even by practising a fraud. Can she then by bringing an action give the Court power to inflict on her the loss of her separate income which she is restrained from anticipating? The principle of *Pike* v. *Fitzgibbon* obliges us to answer that question in the negative; she cannot prejudice her right to the income by doing any act which will have the effect of anticipating it. To give the Court

(1) 17 Ch. D. 454.

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this power would be giving the Court power to interfere with the trusts of the original instrument. I say nothing as to the power of the Court to attach arrears in consequence of any act done after they have fallen due.

FRY, L.J. :—

I also am unable to agree with the conclusion of the Vice-Chancellor. The action was begun in 1882 before the passing of the *Married Women's Property Act*, 1882. How the case would have stood if the Plaintiff had been suing without a next friend under the provisions of that Act I give no opinion: the question is one of some difficulty and is not now before us. In 1884 the action came to an end; it was held to have been unnecessary and improper, and it was ordered that the next friend should pay the costs of the trustees, and leave was given to them to apply in Chambers with reference to the payment, out of the Plaintiff's share or otherwise, of any costs ordered to be paid by the next friend which could not be recovered from him. The next friend could not be found, and on the application of the trustees an order was made that the taxed costs (which amounted to £170), or so much as the next friend should be unable to pay, should be provided for out of the balance of the Plaintiff's income in the hands of the trustees and out of the Plaintiff's future income. The order affects two funds, the arrears of income, and the future income. The only balance of the Plaintiff's income in the hands of the trustees was about £36, which had accrued in 1885, after the order on further consideration. Every act of the married woman that is supposed to have created her liability to pay these costs had been done before this sum accrued. To allow this sum to be affected by her antecedent acts would be to allow her to anticipate her income. If the order be an anticipation as regards the £36, it is so *à fortiori* as regards the future income. I do not say that the Court could not attach income in the hands of the trustees to meet a liability in respect of any act done by the Plaintiff after such income accrued, but I am of opinion that an order attaching subsequent income cannot be sustained. There is no precedent for such an order except *In re Andrews* (1).

(1) 30 Ch. D. 159.

That action was commenced in 1884, after the *Married Women's Property Act*, 1882, came into operation. Mr. Justice *Pearson* may have relied on that Act, though he does not say so. I give no opinion on the effect of that Act, but I cannot follow the reasons which he gave for his judgment. In my opinion there is not jurisdiction to release the income from the restraint on anticipation in all cases where the Court thinks it just to do so. The appeal will be allowed with costs, which will be set off against the costs which the next friend has been ordered to pay. No order as to the costs below.

Chadwyck Healey submitted that as the Plaintiff did not appeal by a next friend there could not be any set-off.

COTTON, L.J.:—

The Plaintiff sued by her next friend, and there has been no order to remove him. The appeal therefore must be by the next friend, and the costs will be set off. Our order is without prejudice to any application by the trustees, either upon the existing summons or upon a fresh summons, for payment of their costs, and costs, charges, and expenses out of the *corpus* of the fund.

Solicitor for Plaintiff: *R. Chapman.*
Solicitor for Defendants: *G. T. Robinson.*

H. C. J.

C. A.
1885
KAY, J.
June 4.
C. A.
1886
Feb. 8.

In re BOLTON.
BROWN *v.* BOLTON.

[1884 B. 3414.]

Will—Construction—Reputed Children.

G. B. went through the ceremony of marriage with *J. A. C.*, whose husband had deserted her and gone abroad many years before and was believed to be dead, but *G. B.* was aware that there was no certain information of his death. Shortly afterwards *G. B.* made his will, by which he gave "to my dear wife *J. A. B.* formerly *J. A. C.*" an interest in certain chattels during her widowhood, and also gave to her the income of his residuary personalty during widowhood, and after her decease or remarriage he gave the *corpus* to "all and every my child and children," as therein mentioned, and in default of children to his nephews and nieces. *G. B.* and *J. A. C.* cohabited for more than a year and a half after the date of the will, when *G. B.* died leaving *J. A. C. enceinte* of her only child. She enjoyed the income of the residue till her death, upon which event the nephews and nieces claimed the property under the gift over, and proved that *J. A. C.'s* child was illegitimate, her former husband having been alive at the time of her marriage to the testator:—

Held, by the Court of Appeal, affirming the decision of *Kay*, J., that the child could not take.

Occleston v. *Fullalove* (1) leaves untouched the rule that there cannot be a valid gift to a future illegitimate child described solely by reference to its paternity.

In re Goodwin's Trust (2) observed upon.

Whether an illegitimate child *en ventre sa mère* at the testator's death, but not *en ventre sa mère* when the will was made, can take as the reputed child of the supposed father, *quære.*

ON the 29th of May, 1865, *G. Bolton* went through the ceremony of marriage with *Jane Ann Cockayne*, who had been previously married to *T. Cockayne*. *T. Cockayne* had left his wife and gone abroad about 1850. A report arrived some years afterwards that he had died in *America*, but no definite information as to his death was ever received. *G. Bolton* was aware of these circumstances when he went through the ceremony of marriage.

On the 19th of July, 1865, *G. Bolton* made his will, by which he bequeathed to a trustee certain chattels "upon trust to permit my dear wife *Jane Ann Bolton* formerly *Jane Ann Cockayne* to

(1) Law Rep. 9 Ch. 147. (2) Law Rep. 17 Eq. 345.

have the use and enjoyment thereof during her life so long as she continues my widow." He gave his real and his residuary personal estate to the same trustee, upon trust to convert his personalty and invest the proceeds, and pay the income of the investments and the rents of his real estate "unto my said wife for and during her life so long as she shall continue my widow." After her decease or remarriage, he directed all the property, real and personal, to be sold, got in, and converted into money, and directed that the proceeds should be paid and divided "unto and equally between all and every my child and children when and as they shall severally attain the age of twenty-one years, and the lawful issue of such of them as shall die before attaining that age, such issue taking equally among them the share their respective parent would have been entitled to if then living and attaining that age. But in case I shall die without having such child or children or issue of such child or children as aforesaid," then he directed the fund to be divided into seven shares, and as to each share he directed it to be divided between "all and every the *lawful* child and children of [a brother or sister of the testator therein named] when and as they shall severally attain the age of twenty-one years, and the *lawful* issue of such of them as shall be then dead," such issue to take equally among them their parent's share.

From the time of the marriage ceremony the testator and *Jane Ann Cockayne* lived together as husband and wife until his death in February, 1867. *Jane Ann Cockayne* was at that time *enceinte*, and shortly after his death gave birth to a female child. There was evidence that the testator knew of *Jane Ann Cockayne* being *enceinte*, and spoke of it with satisfaction.

After the testator's death his trustee was informed by the persons who took under the gift over, that *Jane Ann Cockayne's* husband was living at the date of her alleged marriage to the testator, but no proof was then produced of it. *Jane Ann Cockayne* received the income of the testator's property till her death in June, 1884.

The parties claiming under the ultimate gift having claimed the testator's property, the trustee took out an originating summons to have it decided who were entitled to it. It was

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clearly shewn that *Jane Ann Cockayne's* husband was living at the time of her alleged marriage with the testator, so that the posthumous daughter was illegitimate.

The summons was adjourned into Court, and came on before Mr. Justice *Kay* on the 4th of June, 1885.

Reginald J. Smith, for the Plaintiff, submitted that the question for decision was whether, under the peculiar circumstances of the case, the daughter of *Jane Ann Cockayne* acquired the reputation of being a child of the testator, and was therefore entitled to take beneficially the bequest in the will; or whether, owing to her not having been *en ventre sa mère* at the date of the will she did not acquire such reputation, and should that be so held, then as a consequence the trusts of the will in default of children would take effect.

G. Curtis Price, for the Defendant *Jane Ann Bolton,* the daughter:—

I submit that the testator entertained a doubt as to the existence of *T. Cockayne,* and that that accounted for the absence of the word "lawful" before "child or children" in his will, and its being prefixed to "children" of his brothers and sisters and their issue, thus shewing that it was his intention to provide for his child or children if he should have any by *Jane Ann Cockayne,* even if such child or children should be illegitimate. The bequest could not, assuming that the testator knew that he was not at that time really the husband of *Jane Ann Cockayne,* have been intended for his legitimate child or children, because he had none, and any subsequent marriage would, by sect. 18 of the *Wills Act,* 1837 (7 Will. 4 & 1 Vict. c. 26), have revoked his will; therefore any legitimate children or child never could have taken under the will. No reasonable meaning can be given to the bequest if after giving to his wife and child it does not mean child by that woman. He referred to the cases of *Laker* v. *Hordern* (1); *In re Goodwin's Trust* (2); *Occleston* v. *Fullalove* (3); *Crook* v. *Hill* (4); *Hill* v. *Crook* (5), and *Wilkinson* v. *Adam* (6).

(1) 1 Ch. D. 644.
(2) Law Rep. 17 Eq. 345.
(3) Ibid. 9 Ch. 147.
(4) 3 Ch. D. 773.
(5) Law Rep. 6 H. L. 265.
(6) 1 V. & B. 422.

The case of *Howarth* v. *Mills* (1) may be referred to, but looking at the more recent decisions, the decision there may be questioned.

E. Beaumont, for the Defendants entitled under the gift over, was not called upon.

KAY, J.:—

I am extremely obliged to Mr. *Price* for his very able argument, but I am not at liberty to accede to it, though I have the strongest possible inclination to do so if I could.

The testator went through the ceremony of marriage with a woman who, as he knew, had previously been married, but whose husband had disappeared, and it was not known at the time of the ceremony whether he was living or dead. The testator was, however, quite aware that there was an uncertainty about this, and that it was possible the ceremony he had gone through might not be a marriage in point of law. Under these circumstances the testator made his will, but he did not take those precautions which such a state of facts should have suggested to him of giving a legacy to her "children," or even to "her children by him," or to "his children by her," but he spoke of her as his "dear wife, *Jane Ann Bolton*," and gave her a life interest in his property so long as she should continue his widow, and then directed the trustees to sell his real and personal estate, and after deducting all necessary expenses, to pay and divide the produce "unto and equally between all and every my child and children when and as they shall severally attain the age of twenty-one years, and the lawful issue of such of them as shall die before attaining that age, such issue taking equally among them the part or share their respective parents would have been entitled to if then living and attaining that age, but in case I shall die without leaving such child or children or issue" then to other persons.

The testator died without any child having been actually born, but after his death there was a child born of the woman of which child he was probably, I might say undoubtedly, the father; but the child was not his legitimate child, for according to the

(1) Law Rep. 2 Eq. 389.

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evidence, uncontradicted, the husband of the woman whom the testator called his wife was actually seen and spoken to after the death of the testator, therefore the testator was not in fact married to the woman. But it was contended that because the testator while he lived called the woman his "wife," and left his property to her for life, and after her death to his children, he must by the word "children" have meant her children, or he must have meant his illegitimate children. The first answer to that is, that until the decision of the case of *Occleston* v. *Fullalove* (1) it was understood, and had been repeatedly decided, as was stated by Lord *Chelmsford* in the case of *Hill* v. *Crook* (2), that: "No gift, however express, to unborn illegitimate children is allowed by law, nor under a gift good as to illegitimate children as a class will after-born illegitimate children be permitted to take." Then it was contended that this is no longer the law, considering the decision in the case of *Occleston* v. *Fullalove,* which on appeal was affirmed, against the opinion of Lord *Selborne.* There the testator had gone through the ceremony of marriage with a deceased wife's sister, and she had two daughters by him at the date of the will, and was *enceinte* at that time. He gave a moiety of his property in trust for her for life, and after her death for his reputed children, naming them, "and all other children which he might have or be reputed to have by her then born or thereafter to be born," and a third child—a daughter—was born in his lifetime, and acknowledged by him to be his child, and it was held by the Lord Justices that the after-born child was entitled to take with the other two children. That decision was not consistent with the speeches in the House of Lords in *Hill* v. *Crook,* which I believe expressed the law accurately, as it was understood to be at that time. But the difference between *Occleston* v. *Fullalove* and this case is, that the testator there gave to his children, both to the children who were living, and who were his reputed children, and to "all other children which he might have or might be reputed to have by her then born or thereafter to be born."

Now in this case there is nothing of the sort. In the will there is no reference to children by her, and the only word that is used throughout the will which points to anything of the kind

(1) Law Rep. 9 Ch. 147. (2) Law Rep. 6 H. L. 265, 278.

is, that the testator described the woman as his "wife." No doubt there is a strong suspicion that his wish was to include in the word "children" the children who might be born of the woman while she was living with him as his wife. But how am I to give such a meaning to the word "children" in this will.

According to the well-settled rule, which is expressed in another case in the House of Lords, viz., *Dorin* v. *Dorin* (1), children used alone means legitimate children just as plainly as if the word "legitimate" were written before it. In that case a man had two illegitimate children by a woman. He married her, and the day after his marriage he made his will by which he gave certain property to her for life, and then continued thus: "I leave her at liberty to direct the disposal of the property amongst our children by will at her death," and in default of that he left his property "equally between my children by her." It was there held that the two existing children took nothing, and it was so held notwithstanding that the testator never had another child, and had always treated the two children as his legitimate children.

Now within which class of cases does the present case come? It was said it must come within the case of *Occleston* v. *Fullalove* (2), for this very ingenious reason: that the word "children" in the will could never be operative to pass any interest to a legitimate child, because if the testator afterwards married, that would have revoked the will. I asked whether there was any authority that in the case of a man living with a woman and making his will in favour of his children, such a circumstance had been held to give to the word "children" the meaning of illegitimate children. It has never been so decided, so far as I am aware, and yet before the *Wills Act*, 1837, marriage and the birth of a child was always a revocation, so that before the *Wills Act* it must have occurred many times that a man living in a state of illicit connection with a woman might have made a will leaving property to his children, having no children at the time, and it must have occurred again and again that illegitimate children afterwards born might have claimed under such a will. In the absence of any authority to shew that they could take, that circumstance, it seems to me, cannot be regarded. But the argument was, that here was a man

(1) Law Rep. 7 H. L. 568. (2) Law Rep. 9 Ch. 147.

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living with a woman whom he called his wife: she was not his wife, but whether she was so or not he left his property to her for life, and afterwards to his children, and coupling the fact that he called her his wife with the circumstance that the word "children" never could have been operative to pass property to his legitimate children, because any subsequent marriage would have revoked the will, there is enough to enable the Court to hold that the word means illegitimate. It is impossible to depart from the well-known rule of the Court that "children" means legitimate children, just as though "legitimate" were written before it, unless there can be found on the face of the will and in the surrounding circumstances, which the Court would be bound to look at in order to construe the will, a sufficiently clear indication that certain illegitimate children were intended to be included in the word "children."

I do not find in this case any such indication of intention on the part of the testator as enables me to construe the word "children" in this will to include future born illegitimate children by the woman with whom the testator was living. Consequently the gift over in case he had no children must take effect. The class of nephews and nieces being so numerous, the order will be that the two Defendants shall be allowed to represent the class; and I think it right to say that the costs ought to come out of the estate.

T. F. M.

C. A.

The daughter appealed, and the appeal was heard on the 8th of February, 1886.

G. Curtis Price, for the daughter:—

The testator being in doubt whether *Jane Ann Cockayne* was a widow or not when he went through the ceremony of marriage with her in 1865, and whether his marriage with her might not be invalidated by subsequent proof that *T. Cockayne* was alive at the time, did all that he could to identify her and his children by her; and it is impossible to arrive at any other conclusion than that by "my children" the testator intended his children by *Jane Ann Cockayne*, whom he had previously described as "my dear wife *Jane Ann Bolton*, formerly *Jane Ann Cockayne*," whether legiti-

mate or not. No doubt the description "children" must be taken *primâ facie* to mean legitimate children, but if, looking at the circumstances at the date of the will, there is no possibility of legitimate children to satisfy the terms of the bequest, then illegitimate will be entitled: *Wilkinson* v. *Adam* (1); *Lepine* v. *Bean* (2); *Beachcroft* v. *Beachcroft* (3). Assuming the testator not to have been validly married to *Jane Ann Cockayne*, then if he afterwards married, as his will would thereby have been *ipso facto* revoked, *Wills Act*, s. 18, the words would become insensible unless applied to his children by *Jane Ann Cockayne*. Since *Occleston* v. *Fullalove* (4) it has been settled that there is no rule of policy prohibiting a gift by will to future illegitimate children provided it be not void for uncertainty. Then is not this child of whom the reputed wife was *enceinte* at the date of the will, sufficiently identified as the testator's reputed child by *Jane Ann Cockayne*; and that a child though illegitimate may while *en ventre sa mère*, acquire a name by reputation is distinctly stated by Lord *St. Leonards* in *In re Connor* (5), and by Sir *J. Romilly*, M.R., in *Pratt* v. *Mathew* (6).

[FRY, L.J.:—I cannot understand what is meant by a child *en ventre sa mère* acquiring a name by reputation.]

The expression is not accurate, but it means what is said in *Occleston* v. *Fullalove* (7), acquiring the reputation of being a child. The testator talked to his neighbours about his wife being with child by him. It being a general rule that a child *en ventre sa mère* comes within the expression "child or children," this child, though illegitimate, if sufficiently identified is entitled to take though not actually born at the date of the will: *Crook* v. *Hill* (8).

[BOWEN, L.J.:—You cannot shew that this particular child was the daughter of the woman by the testator, though you may shew that it was the daughter of the woman.]

I shew that it was the child of *Jane Ann Cockayne*, who at

(1) 1 V. & B. 422.
(2) Law Rep. 10 Eq. 160.
(3) 1 Madd. 430.
(4) Law Rep. 9 Ch. 147.
(5) 2 J. & Lat. 456, 460.
(6) 22 Beav. 328, 339.
(7) Law Rep. 9 Ch. 168.
(8) 3 Ch. D. 773.

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the date of the will had acquired the reputation of being the wife of the testator.

[COTTON, L.J.:—Can you contend that a gift to future illegitimate children is good?]

That is my difficulty, no doubt, but it is met by what is said by *Mellish*, L.J., in *Occleston* v. *Fullalove* (1): "The present will is, in my opinion, so worded that future illegitimate children are undoubtedly included in it, and are sufficiently described without making it necessary to prove that they were begotten by any particular man, &c."

[FRY, L.J.:—May not the gift be construed as meaning "my children supposing the marriage to be valid"?]

That is a most improbable intention to be attributed to the testator, and one which the Court will not adopt unless obliged to do so.

[BOWEN, L.J.:—Is there anything in the will that amounts to this, "All children born to *Jane Ann Cockayne* while she is living with me as my wife shall be deemed my children for the purposes of my will"?]

That is, no doubt, the question, and I submit that there is, when the language of the will is interpreted by the facts of the case. How can a gift by a testator who has no child to his children mean anything but the children of the woman whom he calls his wife. *Holt* v. *Sindrey* (2) supports my contention, and the principle laid down in *In re Goodwin's Trust* (3) is almost decisive of the present case.

E. Beaumont, for the parties entitled under the gift over, was not called upon.

COTTON, L.J.:—

This case has been fully and ably argued on the part of the Appellant, but we do not think it necessary to call on the Respondents. The will dated the 19th of July, 1865, is the will of a testator who, in May, 1865, had gone through the ceremony

(1) Law Rep. 9 Ch. 174. (2) Law Rep. 7 Eq. 170.
(3) Law Rep. 17 Eq. 345.

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of marriage with a woman who, as it now appears, had a husband then living. The question is whether under a gift in the will a child not living when the will was made can take. The will contains a trust to permit "my dear wife" (naming her) to enjoy certain chattels "during her life so long as she continues my widow." The testator then gave his residuary personal estate to a trustee upon trust to pay the income "unto my said wife for and during her life so long as she shall continue my widow," and after her decease or re-marriage, he directed the proceeds of all his property to be paid and divided "unto and equally among all and every my child and children" when and as they shall severally attain the age of twenty-one years, and the "lawful issue" of such of them as should die before they attained that age, such issue taking their parent's share. The testator lived with the woman as his wife till his death in February, 1867. She was at that time *enceinte* of a daughter, the present Appellant. It is contended that under the circumstances, and having regard to the language of the will, this child can take under the bequest to children. Though the case is a hard one, I am of opinion that she cannot. It is not in controversy that in a gift to children the word "children" means legitimate children, unless there is something to alter the meaning of the word. It is urged for the Appellant that the trust in favour of this woman whom he describes as his wife, and the fact that inasmuch as a valid marriage would revoke his will, no legitimate child of his could ever possibly take under it, lead to the conclusion that the testator, when he spoke of his children, meant her children reputed to be his. It is not necessary to consider what the effect of this will would have been with respect to an existing child, as in *Hill* v. *Crook* (1), where the testator knew of the invalidity of the marriage. Here there is considerable doubt whether the testator thought that he was dealing with an invalid marriage, though he knew that there was some doubt whether the former husband was not alive. Assume that the testator thought it doubtful whether his marriage was valid, and that the gift in his will was capable of being construed as a gift to existing children, who might or might not be legitimate, we still could not apply the gift to

(1) Law Rep. 6 H. L. 265.]

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future children if illegitimate. *Occleston* v. *Fullalove* (1) was much relied on, but in my opinion that case does not cover this, and leaves untouched the rule that there cannot be a valid gift to a future illegitimate child described only by reference to paternity. In that case the gift was to two reputed children whom the testator named, and all other the children which he might have or be reputed to have by *Margaret Lewis*, then born or thereafter to be born. The Court thought that a description sufficient to include an illegitimate child of which *Margaret Lewis* was *enceinte* when the will was made. It was urged on behalf of the Appellant that the present is the same case, for that, under the circumstances, the testator must by "children" have meant reputed children. But you cannot treat "child" as denoting a man's reputed child, unless a particular child is referred to. To ascertain whether this child is the testator's child we should have to inquire into circumstances which the law does not permit to be inquired into. The argument really comes to this, that the testator's description of the woman as his wife carries with it the same consequences as to children born during the cohabitation as if there had been a valid marriage. *Crook* v. *Hill* (2) is quite different from the present case, and I am unable to come to a conclusion in favour of the Appellant.

As regards *In re Goodwin's Trust* (3) I have the highest respect for the judgments of Sir *G. Jessel*, but I cannot concur with him in that case. He says: "The principle of the decision in *Occleston* v. *Fullalove*, as I understand it, is this, that a gift by a testator or testatrix to one of his or her children by a particular person is perfectly good if the child has acquired the reputation of being such child as described in the will before the death of the testator or testatrix." I cannot find such a rule laid down in *Occleston* v. *Fullalove* and I do not think that this was the *ratio decidendi* in that case. It only decided that the child came within the description in the will of children whom he might be reputed to have by a particular woman, and that there was no rule of public policy which prevented the child from taking. The late Master of the Rolls appears to me to have taken an erroneous view of the principle of that case.

(1) Law Rep. 9 Ch. 147. (2) 3 Ch. D. 773.
(3) Law Rep. 17 Eq. 345, 346.

BOWEN, L.J.:—

I am of the same opinion. A man cannot provide for the illegitimate children either of himself or of another man by any reference that involves an inquiry as to their paternity. The law allows no criterion of paternity but marriage. Now can the Appellant come within a gift to the testator's children unless we first inquire as to her paternity? Clearly not. It is true that although the fact of paternity cannot be inquired into, the reputation of paternity may. The law does not forbid that, and if we could make out from this will that the testator meant that all children of the woman born during his cohabitation with her should be considered or reputed to be his, they might take. But I do not find anything in the will to authorize that construction of it. It is said that the will must apply to illegitimate children, because as marriage would revoke it, no legitimate children could ever by possibility take under it. That argument can only apply if the testator knew that the woman was not his wife, and it is impossible on the evidence to come to the conclusion that he did. There is no evidence on the face of the will, read by the surrounding circumstances, that the testator used the word "children" in any other than its ordinary sense.

FRY, L.J.:—

I am of the same opinion. The Appellant is an illegitimate child, neither born nor begotten at the time when the will was made, and she claims under a gift "to all and every my child and children." Now, as has been already said, the reputation of paternity is a proper subject of inquiry—the fact of paternity is not. The Appellant, therefore, asks us to read "my child and children" as meaning "my reputed child and children." It is urged that this must be so, because, as the testator was not validly married, his will could not operate in favour of any legitimate children, since his marriage would revoke it. But the will is evidently framed on the hypothesis that the testator was married, and the most that can be said is that he felt some doubt whether his marriage was valid. It is therefore impossible to say that by "children" he may not have meant legitimate children. Whether a child *en ventre sa mère* at a testator's death can have

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the reputation of being his child, is a question of doubt, which we should have had to decide in this case if we could have taken the first step by holding that the will intended to provide for the testator's reputed children.

Solicitors for Appellant: *Pilgrim & Phillips*, agents for *Smith, Smith, & Elliott, Sheffield.*

Solicitors for Respondents: *Bell, Brodrick, & Gray*, agents for *Rodgers, Thomas, & Sandford, Sheffield.*

H. C. J.

C. A. 1885 NORTH, J. *May* 21, 22; *June* 20. C. A. 1886 *Feb.* 8, 9.

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[1883 S. 3673.]

Ancient Lights—Alteration of Building—Advancement of Plane of new Windows—Abandonment of Easement—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *s.* 3 [*Revised Ed. Statutes, vol. vii., p.* 224].

The right acquired under the *Prescription Act*, sect. 3, is a right to the access and use of the whole or a substantial part of the particular cone of light which has passed for the statutory period over the servient to the dominant tenement.

Per Fry, L.J.:—The word "access" in the section refers not to the access through the aperture of the dominant, but to the freedom of passage over the servient, tenement, although the aperture which admits the light into the dominant tenement defines the area which is to be kept free over the servient tenement. "The right thereto" means the right to the same access and use of light to and for any building.

The Act does not require any identity, structural or otherwise, in the building, which after the twenty years is to enjoy the right, with the building which has acquired the right; but the right, although not in gross, but one which must be claimed in respect of a building, may be claimed in respect of any building which is enjoying the whole or a substantial part of the light which passed into the dominant tenement through the old aperture.

Consequently no alteration in the plane of the windows of the dominant tenement, either by advancing or setting back the building, will destroy the right so long as the owner of the dominant tenement can shew that he is using through the new apertures in the wall of the new building the same, or a substantial part of the same, light which passed through the old apertures into the old building.

But the right to relief may be lost even where there is no substantial alteration if the owner of the dominant tenement has by his alteration so confused the evidence that he cannot prove the identity of the light.

S., in 1872 pulled down a building in the east wall of which were

ancient lights, and erected on the site a new building with larger and more numerous windows. No record was preserved of the positions or dimensions of the ancient lights; but it was found as a fact that substantial portions of six of the new windows corresponded with three of the ancient lights. The east wall had been advanced by distances varying from 2 ft. 3 in. to 13 in., the effect of which was slightly to alter the plane of the new windows:—

Held (affirming the decision of *North*, J.), that the alteration made by *S.* did not amount to an abandonment of his right, and that the Plaintiff was entitled to an injunction to restrain any obstruction of so much of the six new windows as corresponded with the three ancient lights.

THE Plaintiff was the owner of buildings standing on the west side of *Denton Yard, Newcastle-upon-Tyne.*

For upwards of twenty years prior to 1872 certain old buildings extended for 84 ft. 6 in. along the west side of *Denton Yard*, which was a narrow lane 7 ft. 5 in. wide at its southern end and 5 ft. 7 in. wide at its northern end. These buildings consisted of a larger building three storeys high to the north,—and a smaller building two storeys high to the south, which were lighted by various ancient lights on their eastern side looking into *Denton Yard.* In 1872 the Plaintiff, the owner of the buildings and the site of the yard, pulled down the buildings and erected new ones in their place of greater elevation and lighted by larger and more numerous windows looking into the yard.

The east wall of the Plaintiff's new building was also advanced so as to include part of what had been previously a portion of the yard, which thereby was reduced to a uniform width of 4 ft., the advance being about 1 ft. 7 in. at the north end of the new buildings, then diminishing to 12 or 13 in. only, and then again increasing to 3 ft. 5 in. at the south end.

The Defendant in 1883 pulled down four old buildings which belonged to him, on the east side of *Denton Yard* immediately opposite to the new buildings of the Plaintiff, and began to erect houses of greater elevation on their site. In so doing he had, prior to the commencement of the action, to some extent obstructed the access of light to the windows on the east side of the Plaintiff's new buildings.

When the Plaintiff's old buildings were pulled down no formal record was kept of the exact position of the old windows, but

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upon a reference made in this action their position had been ascertained to some extent.

The ancient lights of the Plaintiff's smaller building were not proved to correspond with any part of the windows of his new building.

The ancient lights on the lowest and highest storeys of the Plaintiff's larger building corresponded only to a very slight extent, if at all, with any windows now existing in the Plaintiff's new building.

No relief was asked as to any of those lights.

The ancient lights of the Plaintiff on the first or middle floor of his larger building consisted of three windows, each 3 ft. 6 in. high. No. 1, the northernmost, was 3 ft. from the north end of the Plaintiff's building and 9 ft. wide and divided into two compartments by a perpendicular brick partition 9 in. broad. No. 2 was 26 feet from the north end of the building—also 9 ft. wide and divided into two compartments by a similar brick partition. No. 3 was 40 ft. from the north end and was 13 ft. wide and divided into three compartments by two brick partitions each 9 in. wide.

The windows on the middle floor on the east side of the Plaintiff's new building included more than half of one compartment and more than one third of the other compartment in window No. 1, more than one third of one compartment and more than half of the other compartment in window No. 2, and more than one-third of one of the compartments and about three-fourths of the other two compartments in window No. 3.

By reason of the advance of the Plaintiff's new buildings eastwards the planes of the present windows respectively were further to the east by about 18 in. than the plane of No. 1 window; by about 13 in. than that of No. 2 window; and by about 2 ft. 3 in. than that of No. 3 window: the planes of the old and corresponding new windows respectively were very nearly but not quite parallel to one another.

The Plaintiff brought this action claiming an injunction to restrain the Defendant from so building as to interfere with his ancient lights.

On the hearing before Mr. Justice *North* the injunction asked

for was limited by the Plaintiff's counsel to such parts of the lights on the middle floor of the Plaintiff's new buildings as corresponded with his ancient lights.

The action was heard before Mr. Justice *North* on the 21st and 22nd of May, 1885.

Rigby, Q.C., *Bruce*, Q.C., and *W. C. Druce*, for the Plaintiff, contended that there had been no abandonment by the Plaintiff of his rights, and that notwithstanding the alteration in the plane and distance he was entitled to as much light as he formerly had. They cited *Chandler* v. *Thompson* (1) and other cases all of which are referred to in the judgment.

Barber, Q.C., and *Chester*, for the Defendant:—

The right can only be acquired in respect of a particular window, and if in rebuilding different windows are put in, the right is gone. Here is a projection and the windows are new windows in a new wall. The Plaintiff clearly did not care to retain his old lights and abandoned them. The cases are conflicting. If the Plaintiff succeeds he will acquire an entirely new right to light for all the new space over which he has built, and will acquire a new easement. He had no right to access of light for that strip of land, and cannot acquire it. If he chooses to build an inside partition where the old wall stood he will have an entirely new room, and if he succeeds that new room will have the easement of ancient lights.

Rigby, in reply.

1885. June 20. NORTH, J. (after stating the facts of the case and giving the dimensions of the buildings and of the windows, continued):—

Putting aside for the moment the fact that the Plaintiff's new building has been erected more to the eastward than the old one it will be observed that many ancient windows of the Plaintiff were altogether destroyed in the erection of his new buildings, and that all the others were altered to a greater or less extent, so that no one of the existing windows occupies exactly the same

(1) 3 Camp. 80.

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position as any one of the ancient windows did. The existing windows, which include within their area any portions of the ancient windows numbered 1, 2, and 3, do not include the entire area of any ancient window, and each of these existing windows also includes a considerable area which before 1872 was not window at all, and it was contended by the Defendant that the fact that the Plaintiff had twelve years ago wholly pulled down his old buildings without preserving any record of the position of the old windows—that he had built a new building in which the windows are arranged in a symmetrical and uniform way without following the position of the ancient lights—that many of the ancient lights had been wholly and all the others had been in part blocked up—and above all that the wall in which the new windows were made differed materially both in position and direction from the wall of the old building which contained the ancient lights;—all led necessarily to the conclusion that the Plaintiff had, when he took down his old building, given up and abandoned his old lights, and that no part of any of his existing windows can be treated as an ancient light at all.

The law with respect to the access of light to buildings was clearly pointed out by the House of Lords in *Tapling* v. *Jones* (1). The Act provides that when the access and use of light to and for a building has been actually enjoyed therewith for the full period of twenty years without interruption the right thereto is absolute and indefeasible in the absence of any written agreement or consent as to such enjoyment. Lord *Westbury* in that case pointed out that this could not be defeated by anything short of abandonment. Lord *Chelmsford* says (2): "The right continues uninterruptedly until some unequivocal act of intentional abandonment is done by the person who has acquired it, which will remit the adjoining owner to the unrestricted use of his own premises. It will, of course, be a question in each case, whether the circumstances satisfactorily establish an intention to abandon altogether the future enjoyment and exercise of the right. If such an intention is clearly manifested, the adjoining owner may build as he pleases on his own land," and, as he subsequently pointed out, a "right once abandoned is abandoned for ever."

(1) 11 H. L. C. 290; 20 C. B. (N.S.) 166. (2) 11 H. L. C. 319.

Now so far as the Plaintiff has built up portions of his ancient windows, his doing so seems to me very strong evidence that the parts so built up have been abandoned. I do not say conclusive evidence, having regard to the cases of *Stokoe* v. *Singers* (1) and *Crossley* v. *Lightowler* (2). So long, however, as the portions so closed up twelve years ago remain closed I think the Plaintiff must be taken to have closed them with the intention of abandoning all rights in respect of them. But I do not see how the abandonment of part of an ancient window by building it up and so preventing the light from passing through can be any evidence of abandonment of the other part which is not built up. The intention not to abandon that part of the window, but to continue to enjoy the access of light through it as heretofore, is as clearly shewn by leaving it open and unblocked, as the intention to give up the other part is shewn by closing it; and so long as a material and substantial part (for I do not refer to trivial matters of which the law does not take heed) of an ancient light is left open when the other part of it is closed up, I cannot see any intention of abandonment or evidence for a jury of such intention, as to the part left open from the fact that the remaining portion of the window is thrown away or given up. If two ancient windows stood near together in a dominant tenement, it would not be contended that the abandonment of one of them by building it up could be any evidence of intention to abandon the other window, and it seems to me quite immaterial whether the light left open is or is not separated from the light which is closed by part of the wall of the house, or by a mullion of brick or stone or otherwise.

Before the decision of the House of Lords in *Tapling* v. *Jones* (3) it was considered that the enlargement of the area of an ancient window in a dominant tenement gave a right to the owner of a servient tenement to obstruct the light to the ancient portion of the window, if he could not otherwise do what was necessary to prevent the gaining of an easement by the new portion of the same window. This was based upon the proposition that a man could not alter the size and position of his window so as materially

(1) 8 E. & B. 31. (2) Law Rep. 2 Ch. 478.
(3) 11 H. L. C. 290.

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to prejudice the owner of the servient tenement, and obviously could only apply to a case in which something was made into window which had not been window before; and could have nothing to do with a case in which the only alteration made was that an ancient window was wholly or partially built up, which act could not prejudice the owner of such servient tenement. *Pollock*, C.B., said in that case (1): "If by grant or user a party has acquired a right to have certain lights unobstructed his right is limited to what has been granted or acquired by user. He may, indeed, abandon any portion of what has been granted or used: but he cannot enlarge it, increase it, or change the mode in which it has been enjoyed." His view as to the effect of enlargement of a window was not adopted by the House of Lords; but his opinion that a part of a window might be abandoned while the rest of it was preserved has never been dissented from. In *Fowlers* v. *Walker* (2) the plaintiff only failed because the evidence did not shew that any portion of any new window represented any substantial part of any old window. Again, in *Newson* v. *Pender* (3) all the Lords Justices concurred in the view that there was a legal right of action in respect of a window which included in its area any substantial portion of an ancient light; and although Lord Justice *Cotton* pointed out that it did not follow that an injunction ought necessarily to be granted in such a case because a legal right existed, yet in my opinion the existence of a legal right is wholly inconsistent with abandonment.

I have referred to this point somewhat in detail, because of the language of some of the Judges in the case of *Hutchinson* v. *Copestake* (4), where Mr. Justice *Blackburn* and Baron *Channell* rested their judgment on the ground that they found that none of the plaintiff's present windows substantially corresponded with an ancient window, and drew the inference from it that none of the present lights was the continuation of an ancient light, and Baron *Bramwell's* decision was rested on the ground that no one of the existing windows occupied the same position as any one of the ancient windows; but looking at the authorities to which I have referred, and at the observations of Mr. Justice *Blackburn* and

(1) 12 C. B. (N.S.) 826, 864.
(2) 51 L. J. (Ch.) 443.
(3) 27 Ch. D. 43.
(4) 9 C. B. (N.S.) 863.

Baron *Bramwell* in their judgments in the Exchequer Chamber in *Jones* v. *Tapling* (1), it appears to me that the Plaintiff's right continues with respect to any substantial part of an old window which has not been abandoned, but is represented by part of a new window, and that this applies to all the compartments I have mentioned, unless the point principally relied upon by Mr. *Barber*, viz., the alteration of the plane of the windows to the extent I have mentioned, prevents the new lights from being a continuation of the old lights.

As a matter of fact I have come to the conclusion that the Plaintiff's existing lights now in question are a substantial continuation of ancient lights, and that rays of light still do, or but for the Defendant's buildings would, pass over the Defendant's land and through the portions of the Plaintiff's new windows which correspond with old windows, and so light the space within in the same manner in which such space was lighted through the corresponding portions of the old windows; and, that if the Defendant's buildings were completed portions of the space within the Plaintiff's buildings which have for upwards of thirty years enjoyed the access and use of light through openings which substantially, notwithstanding the alteration in plane, coincide with existing openings would cease to enjoy such access and use of light.

But it is said that the decided cases settle that the alteration in plane of an ancient window amounts to an abandonment of any easement in respect of such window, and it is therefore necessary to consider what they decide. The first case relied upon by the Defendant is *Blanchard* v. *Bridges* (2), where the old lights had been departed from much more than in the present case. But there the decision was that the right which had been granted to the owner of the dominant tenement must be measured by the enjoyment which has been had of it, and that the owner of the servient tenement could not fairly be considered to have granted more than the access of light through a particular aperture or one of the same dimensions and in the same position, and therefore when such opening was discontinued the right granted ceased also. Since then the case of *Tapling* v. *Jones* (3) has put the law

(1) 12 C. B. (N.S.) 826. (2) 4 Ad. & E. 176.
(3) 11 H. L. C. 290.

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on quite a different footing, and the grounds upon which the former case was decided no longer apply.

The next case is *National Provincial Plate Glass Insurance Company* v. *Prudential Assurance Company* (1), and the Defendant's counsel rely upon what the late Master of the Rolls said there. But it will be noticed that his remarks in their favour were as to matter of fact rather than of law, for he intimated that in his opinion an alteration of a few inches or a few minutes of a degree, or perhaps a degree, was unimportant, but decided as he did upon the ground that the plaintiffs there had built a new house in a different position a considerable distance from the old house, a state of things which differs in my opinion from that with which I have to deal; and the judgment of Mr. Justice *Fry* in the same case is, that a right to light once acquired is not necessarily lost by an alteration in the position or plane of the window through which such light has passed. Again, in the case of *Ecclesiastical Commissioners* v. *Kino* (2), where a church had been pulled down as not required, with the intention of selling its site for the erection of lay buildings, the Court assumed that the new buildings would be so erected as to preserve the ancient right of light; but I certainly do not understand this to mean that the windows of the new buildings would be identical with the old church windows in shape, size, and position. In *Newson* v. *Pender* (3) the windows had been enlarged and some parts blocked up, but it does not appear that the position of the windows had been altered. There is also a case of *Barnes* v. *Loach* (4) in which it was decided that the setting back of the walls of some cottages in the new walls of which windows were made of the same size and in the same relative positions as the old windows, but in a different plane, did not destroy the old easement of light. The case of *Bullers* v. *Dickinson* (5) is a recent decision by Mr. Justice *Kay* to the same effect, though *Barnes* v. *Loach* was not cited. In *Barnes* v. *Loach* another incident is found. A new wall with a window in it had been built outside and at a different angle to an ancient window; but the old wall and window had been left

(1) 6 Ch. D. 757.
(2) 14 Ch. D. 213.
(3) 27 Ch. D. 43.
(4) 4 Q. B. D. 494.
(5) 29 Ch. D. 155.

within unaltered: and it was held that the new erection did not in any way destroy the easement of light. The continuance of the old window was no doubt a useful piece of evidence upon the question of fact whether the easement had been abandoned, just as the erection of a solid wall within the new window in the place where the old window had been, would be a strong piece of evidence that it had been abandoned. But in the present case I find as a matter of fact that the ancient lights I have mentioned have not been abandoned, and that being so I hold the removal of the old wall circumscribing the apertures of the old windows to be immaterial, as the access of light into the interior of the new buildings is still enjoyed through spaces through which it was enjoyed before the Plaintiffs' buildings were altered.

I do not forget that in all the cases to which I have referred except the last the new windows were retired instead of being advanced, and it is said that the advance of the new buildings increases the burden of the servient tenement. I do not see that it does so, for the new windows have not been standing for nineteen years, and the right of the Defendant to build on his own premises is precisely the same that—neither greater nor less than—it was before the Plaintiff's old buildings were pulled down.

Under these circumstances I am of opinion that the Plaintiff is entitled to the relief which he asks, limited to the lights I have referred to specifically, and the costs must follow the result.

Cur.—Restrain the Defendant from permitting to remain erected any wall, &c., so as to darken, injure, or obstruct any of the ancient lights of the Plaintiff's premises, as the same were enjoyed by means of those portions of the windows on the first floor of the Plaintiff's old buildings, which have not been blocked up in the rebuilding of the Plaintiff's premises.

C. M.

From this decision the Defendant appealed. The appeal came on for hearing on the 8th of February, 1886.

Barber, Q.C., and *Chester*, for the Appellant:—

We raise two points: 1. That when a house in which there are ancient lights is rebuilt, no new window has a right to light unless it substantially comprises the opening of an old one. The

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judgment of Lord Justice *Cotton* in *Newson* v. *Pender* (1) supports the view that at all events there can be no injunction unless this is the case. The reconstruction in the present case shews no intention to preserve the old lights: the new windows being arranged on an entirely new plan without regard to the situation of the old ones, and not a single old window is entirely included in a new one. According to *Hutchinson* v. *Copestake* (2) under these circumstances the legal right is gone. *Tapling* v. *Jones* (3) has been treated as overruling that decision; but it did not, it only overruled *Renshaw* v. *Bean* (4), and the majority of the Judges who decided *Hutchinson* v. *Copestake* did not approve of *Renshaw* v. *Bean*. The two cases, therefore, are quite distinct, and there is nothing to overrule *Hutchinson* v. *Copestake*.

The second question is whether the Plaintiff by advancing his building nearer to that of the Defendant has not lost the easement he formerly enjoyed. *Blanchard* v. *Bridges* (5) is an authority for this proposition, although it is true that case was one of right to light under a grant and not under the statute. The setting back and the advancement of a wall containing the window necessarily cause a different incidence of light, and any substantial alteration in the plane of the new window destroys the right: *National Provincial Plate Glass Insurance Company* v. *Prudential Assurance Company* (6); *Barnes* v. *Loach* (7). In both those cases and in *Bullers* v. *Dickinson* (8) the right was held not to have been lost, but the walls had been set back and the burden on the servient tenement thereby diminished, instead of being increased, as it must be, by an advance of the plane of the new windows. In *Barnes* v. *Loach*, no doubt, in one instance a new wall had been set forward, but so carefully was the intention shewn of preserving the old right that the original wall with the old windows was still retained, so that the same light passed through the old windows and no abandonment of the previous right could be inferred.

The right under the statute is not a general right to any build-

(1) 27 Ch. D. 43.
(2) 8 C. B. (N.S.) 102; 9 C. B. (N.S.) 863.
(3) 11 H. L. C. 290.
(4) 18 Q. B. 112.
(5) 4 Ad. & E. 176.
(6) 6 Ch. D. 757.
(7) 4 Q. B. D. 494.
(8) 29 Ch. D. 155.

ing; the only thing acquired by prescription is access of light in a particular mode, which finds its way into a "dwelling-house, workshop, or other building" through some aperture in the nature of a window, and it must be enjoyed with a building as that building stood when the statute began to run. This statutory right must be construed strictly, and no alteration in the dominant tenement can be allowed which will throw a greater burden on the servient tenement, and a considerable advance in the new wall must have that effect. There has been here a substantial alteration, not a reconstruction of the dominant tenement as a continuance of the former building; no intention has been shewn of preserving the rights formerly belonging to the old building, and the Plaintiff must be treated as having abandoned his rights: *Moore* v. *Rawson* (1); *Heath* v. *Bucknall* (2); *Fowlers* v. *Walker* (3).

The injury to the Plaintiff is so small that he can be entitled to damages only, and not to a mandatory injunction.

Rigby, Q.C., *Bruce*, Q.C. (*Swinfen Eady*, with them), for the Plaintiff:—

The access of light as enjoyed by the Plaintiff previously to the alteration is sufficiently material to entitle him to the equitable relief of an injunction.

The right is to the access and use of light, which, no doubt, is defined and measured by the ancient aperture; but what the statute gives is the right to the access of an irregular cone of rays of light coming from different parts of the heaven, some slanting, some horizontal, over the servient tenement. If this be so, an alteration of the position of the dominant tenement, either by setting back or advancing, cannot affect the servient tenement; it is only the same cone of light which formerly passed over it to which the dominant tenement is entitled, nor can any greater right be acquired against it unless its owner allows it to be so acquired by a fresh prescription. The right is a statutory right, and we must start from the *Prescription Act* as a new enactment, and unless anything in the Act restricts the access of light

(1) 3 B. & C. 332. (2) Law Rep. 8 Eq. 1.
(3) 51 L. J. (Ch.) 443.

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to the same building standing on the same foundation, the Court cannot so restrict it. No doubt the right is not a right in gross: it does not profess to interfere with the unappropriated light of day: it is a right to be enjoyed with some building, but when it has once become appropriated to a building then that same light may be enjoyed for any building.

No case can be stronger in support of this proposition than *Ecclesiastical Commissioners* v. *Kino* (1), where the old building which had enjoyed the right was a church, and the then empty site was intended to be occupied by business warehouses, and in *Bullers* v. *Dickinson* (2) the new building was totally different from the old.

Nor can the Court insert into the Act any restrictions by analogy to the principles on which cases of grant by express covenant or consent (as *Blanchard* v. *Bridges* (3)) were decided.

The Plaintiff cannot be presumed to have abandoned without any consideration a valuable right; it is difficult to see how any person can abandon that which he in fact retains, and so long as the minutest portion of the ancient light remains there is no evidence of abandonment, although possibly in that case, in accordance with the maxim *de minimis*, the Court will not assist him in enforcing his right, and that was the principle on which the case of *Heath* v. *Bucknall* (4) was decided: see per *Giffard*, L.J., in *Staight* v. *Burn* (5).

In *Fowlers* v. *Walker* (6) the Court held that the plaintiff had in the alterations so confused the evidence that he failed to prove what he was required to prove, viz., the identity of the light, and in the absence of such evidence the Court could not assist him.

Barber, in reply:—

Although the case depends on the *Prescription Act*, that Act has not altered the pre-existing law as to the nature and extent of the right. The Plaintiff has no greater light than he had before the Act: see per *James*, L.J., in *Kelk* v. *Pearson* (7).

(1) 14 Ch. D. 213.
(2) 29 Ch. D. 155.
(3) 4 Ad. & E. 176.
(4) Law Rep. 8 Eq. 1.
(5) Ibid. 5 Ch. 163, 166.
(6) 51 L. J. (Ch.) 443.
(7) Law Rep. 6 Ch. 809, 811.

COTTON, L.J. :—

This appeal raises a question of considerable importance, and, to a considerable extent, one of nicety.

The Defendant had four sheds on one side of a narrow yard, the Plaintiff's building, which consisted of two blocks, one a low building and the other somewhat higher, which has been called the large building, being on the other side. No question is raised regarding any lights in the new building, which has been put up in substitution for the low building. The question arises with reference to six windows corresponding with portions of three old windows in the original large building, and it is in respect of these that the injunction has been granted. The new building of the Plaintiff is entirely different in character from the old building, and instead of having three rows of lights of rather a long shape, it is lighted by windows of an entirely different kind.

One of the great contentions on behalf of the Defendant has been this, that the Plaintiff by the mode in which he has erected the new building has abandoned the old right which he formerly had. In my opinion that is an erroneous contention. Of course he has abandoned those old lights, the area of which is entirely occupied by a brick wall. He has put up that wall in such a way as to shew that he did not intend to use or enjoy that light which formerly went into the old building through those windows which are entirely blocked up; and in my opinion that would be sufficient to shew an abandonment as regards those windows. But the windows in question occupy a substantial portion of the space formerly occupied by the three windows in the old building; and although he has not constructed his building in such a way as to take all the light which formerly passed through the old windows in the old building, we should, I think, be coming to a wrong conclusion in holding that the Plaintiff, having erected this building with the six windows occupying positions where they would receive a considerable portion of the light which went into the three old windows, intended in respect of these new windows to abandon such right as he formerly had.

Now, if the right in respect of light to these windows has not been abandoned, is the Plaintiff entitled to retain his injunction?

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The argument turned principally upon this, that this eastern wall of the Plaintiff's building has been moved forward, and therefore does not occupy the same plane as was occupied by the wall of the old building in which the old windows which were entitled to protection were situated. The wall has been advanced in some parts more than in others. There is a difference of 18 inches in the position of one of the windows caused by moving the plane further forwards, and in the case of another of 13 inches, and in that of another of 2 ft. 3 in.; and it is said that the moving forward of the wall has so materially altered the easement that the Plaintiff cannot now rely upon it.

We must consider what is the true construction of the statute. Sect. 3 is as follows: "When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible." This section is undoubtedly dealing simply with the right of light for the use of "any dwelling-house, workshop, or other building." After twenty years the person who owns a dwelling-house, if he has used and enjoyed light, gets an absolute right to what he has used and enjoyed; and, in my opinion, the quantum of his enjoyment is defined by, and must depend on, the area of his windows, and also on the distance they are from other buildings. He acquires, in consequence of the position of other buildings and the size of the window, a right under this section to the enjoyment of that particular light which has come to his building. "The access and use of light" depends upon the number of pencils of light which come directly or by refraction into that window. After twenty years what is to happen? It was contended by Mr. *Barber* and Mr. *Chester* that any alteration whatsoever in that window would destroy the right and prevent the owner of the house continuing to enjoy it. In my opinion that contention is wrong. If part of the window is afterwards cut off, so as to diminish it, he retains the right to that portion of the light which still comes through the diminished window, and *Tapling* v. *Jones* (1) shews that if he enlarges the window he still has the right to that portion of light which for

(1) 11 H. L. C. 290.

twenty years has passed through so much of the ancient window as is still left undisturbed. That, however, does not deal with the question now before us, because the main argument was that, independently of the alteration of size, the moving of this wall further forward destroyed the right; but it disposes of the argument that the mere fact that part only of the old window is left in the new will destroy the right. Where there has been no abandonment of the right existing in respect of the old window, that right is not lost by reason of the fact that only part of the old window is included in the new, or that the old window has been added to by the addition, either laterally or vertically, of a new window.

What alteration, then, will deprive the Plaintiff of his right, this right which can be claimed only in respect of a dwelling-house, workshop, or other building? Will the alteration of the purpose or object for which the building is to be used, as the conversion of a workshop into a house, or of a house into a workshop, have this effect? It will not: that is definitely settled by the case of *Ecclesiastical Commissioners* v. *Kino* (1). The old building there was a church, and that which was to be built on the site of the church was a warehouse, an entire alteration of the purposes and of the character of the building. Then will moving back the plane of the wall deprive the Plaintiff of his right? In my opinion, no. It is difficult to see how the mere fact of moving back can do so, and in fact there is authority against such a proposition. Then if moving it back will not, will simply moving it forward have this effect? In my opinion both the moving back and the moving forward may destroy the right, because the new building when constructed may, either by being substantially advanced or substantially set back, be so placed that the light which formerly went into the old windows will not go into the new. If a building is set back, say 100 feet, it will not enjoy the same cone of light that was enjoyed before, but will have an entirely different cone, and it may be moved so far forward that it will not enjoy the same light as that enjoyed by the old building. In my opinion the question to be considered is this, whether the alteration is of such a nature as to preclude the Plaintiff from

(1) 14 Ch. D. 213.

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alleging that he is using through the new apertures in the new wall the same cone of light, or a substantial part of that cone of light, which went to the old building. If that is established, although the right must be claimed in respect of a building, it may be claimed in respect of any building which is substantially enjoying a part, or the whole, of the light which went through the old aperture.

It may be that in some cases, even although there is not such an alteration as would deprive the plaintiff of his right, he may by other means have precluded himself from insisting on it, because he may have so altered his building, or be so wanting in evidence as to what the position of the old window was, that though he may be actually enjoying a portion of the old light he cannot shew it, and so by a mere defect of evidence he will be unable to enforce such right as he has. But here, in my opinion, considering the small actual advance (although no doubt relatively considerable, having regard to the distance between the two buildings) we ought not to hold that a substantial portion of the old light does not pass through the new openings. I think the decision of Mr. Justice *North* was right and that the appeal fails.

There is one point I have not yet mentioned, which was argued by Mr. *Chester*, that no such injury was shewn here as would entitle the Plaintiff to an injunction. But in my opinion we must treat the way this case was dealt with in the Court below as precluding us from entering into that question. It was dealt with on the footing that there were questions of law to be decided, and if they were decided against the Defendant, the Defendant conceded or rather did not deny, that there was such a substantial interference with the light in respect of which the Plaintiff claimed protection as to entitle him to an injunction.

BOWEN, L.J.:—

In deciding this case we have to put a construction on the 3rd section of the *Prescription Act* (2 & 3 Will. 4, c. 71). The point is one of some novelty as well as of importance.

We must begin by considering what it is with respect to the access of light that this Act has done. In *Kelk* v. *Pearson* (1),

(1) Law Rep. 6 Ch. 811.

Lord Justice *James* expressed an opinion that the statute has in no degree altered the pre-existing law as to the nature and extent of the right of access of light. His language must not be misunderstood. Since the statute, as before, the right remains a right to have an amount of access of light to and through apertures in a house or building which would be sufficient for the use and occupation of the building. It is not a right in gross, but a right to light in connection with a "dwelling-house, workshop, or building," the building, workshop, or dwelling-house being the means by which the light is enjoyed for a period of twenty years, and by which the right to enjoy it is acquired. But the right has been altered by an Act of Parliament in one and a very material sense. It used, in the absence of a specific agreement, to depend on the implication, derived from user, of some supposed covenant by the owner of the servient tenement, by which he was deemed to have precluded himself from thenceforward interfering with the access of light to the dominant tenement to the extent of such user. What the statute has done is to create a fresh origin for the right. The origin of the right is to be, not the supposition of any implied covenant,—that is not necessary, provided you fulfil the requirements of the statute as to enjoyment for a certain period—not enjoyment as of right, but actual enjoyment. There may still, since the statute, be conventional agreements between the parties which dispense with the necessity of proving even the enjoyment for twenty years, but the statutory origin which it is necessary to consider in the present instance is an alleged enjoyment for twenty years. Coming to the language of the section, what does it do? It seems to me that it creates an indefeasible right to the access of a specific quantity of light for the use of a house, workshop, or building. Mr. *Barber* argued that this right was only a right to have the light enter through the same definite aperture. The statute, however, says nothing about an aperture, though it is perfectly true that we cannot read the statute intelligently without seeing that it assumes that there must be some measure of the enjoyment in order accurately to fix the right which is to be acquired after an enjoyment of twenty years, and that measure can only be the windows or apertures of the house; or, to speak still more strictly and accurately,

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the measure of the enjoyment and the measure of the right acquired are not the windows and apertures themselves, which would involve a continuing structural identity of the windows, but the size and position of the windows, which necessarily limit and define the amount of light that arrives ultimately for the house's use. That, as it seems to me, is the measure which reason evolves from the words of the Act of Parliament. The section does not merely say "access" but "the access and use of light to and for any dwelling-house, workshop, or other building," and "enjoyed therewith." Mr. *Barber* endeavoured to persuade us that no right could be enjoyed after the lapse of twenty years if there had been any fluctuation in the measure of the access and use of the light during the twenty years. I cannot myself see that the statute warrants any such view. I should have thought that if there has been a use, for ten years out of the twenty, of a small window, which is enlarged during the remaining ten years of the twenty to double its size, the only right acquired in the twenty years was the right to have arrive for the use of your house the minimum portion of the pencils of light which had passed through this smaller structure; because you could not be said to have enjoyed the larger amount of light for twenty years when you had enjoyed it for ten years only—and I should pause for some time before coming to the conclusion that a man after using the smaller access of light for twenty years through the windows had lost his right to all access whatsoever merely because at some time during that period he had fruitlessly attempted to acquire an enjoyment of more. The right once acquired seems to me to be a right the true nature of which you can only define by withdrawing your mind from the consideration of the identity of the aperture through which the enjoyment has been had and fixing it on the amount of light which has reached it and passed through it. What the person who has acquired the right is entitled to is not the window but the free access of such an amount of light as has passed through that window.

Is that right lost by anything short of abandonment? In the first place how can you lose a right to a definite amount of light by trying to enjoy for your own purposes more light than you had acquired a prescriptive right to enjoy? If a man has a

certain amount of light at his disposal for use, it seems to me that he has a perfect right to make the best of it, as Mr. *Rigby* said, and that he is not bound only so to use his land as to exercise the minimum of enjoyment which is to come by the twenty years' user. He may use his land as he pleases. It is true that any additional user will not increase the right, but it does not seem to me that any additional user can diminish it. I think that must follow from *Tapling* v. *Jones* (1), which established that a man by adding to his own property, by adding new windows, did not lose his right to the access of light through the old windows, and, applying reason to work out the logic of that decision it must follow that a man may lessen his light without losing everything. A man by blocking up a part of old lights and adding new windows does not lose his right to so much of the old light as is not so blocked up.

Then it is said that you may not alter the building. I have endeavoured to explain why I think the structural identity of the aperture is not a test so much as the position and size of the aperture. It is said that *Blanchard* v. *Bridges* (2) is inconsistent with this. That case was decided under the old law, before the statute, and it may be that, as Mr. Justice *Patteson* seems to have thought, the origin of the right to enjoy, or in other words the consent, it may be, of some preceding owner of the servient tenement, was the matter to be regarded, and that the supposed consent of such owner, from which the right flowed, must be looked at with reference to the state of things at the time the right was given. I am not prepared to say that I can follow his reasoning so clearly as I should like, but whatever be the view entertained in that case, what need is there to apply any such reasoning to a right which has now a statutory origin? If the right is a right to a definite amount of the pencils of light for the use of the dwelling-house, why may not the owner of the house advance or recede as he chooses? He will obtain by so doing no more enjoyment of light than that to which he is entitled. He does not increase the burden on his neighbour's tenement, and he does not, as it seems to me, do anything which affects the

(1) 11 H. L. C. 290. (2) 4 Ad. & E. 176.

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right given him by the Act of Parliament itself. It has been decided in the cases of *Staight* v. *Burn* (1) and *Ecclesiastical Commissioners* v. *Kino* (2) that the right to these pencils of light remains even though the dominant tenement may be pulled down or altered with a view to being rebuilt. They shew that the structural identity of the building is not the test, but I think they shew more, viz., that the measure of enjoyment is not the aperture itself but the size and dimensions of an aperture in that position.

Alteration of the building has nothing to do with the question, —the question is whether any change is being made in the measure of the volume of light that arrives there.

There is, however, one way in which the right may be lost. It may be that the destruction of the identity of the building may, if it amounts to an abandonment, put an end to the statutory right which has been acquired. A right acquired by statutory enjoyment may certainly be lost by abandonment, and I do not say that if it can be shewn that a building has been so altered that the proper inference from the alteration and from the conduct of the dominant owner is that he has released or abandoned his right, or has given the owners of the servient tenement the right to believe and to act on the belief that he no longer intends to insist on it, there may not then be an abandonment. But it is not easy to prove abandonment from the mere alteration or the rebuilding of the building. A building wants light if it has any windows in it and is not a blank wall; and it would take a great deal to persuade me that a man intends to abandon any of the old light he enjoyed, if the building is rebuilt substantially so as to preserve evidently and without confusion of proof the enjoyment either of the whole of the volume of light which was enjoyed before or of some material part of it. In this particular case I think there has been no abandonment at all.

I agree with Lord Justice *Cotton* in thinking that it is too late now to consider the point raised at the end of the Appellant's argument, that as to one or two of the windows no substantial damage has been done, and I do not think that we could decide in favour of that point upon the materials before us.

(1) Law Rep. 5 Ch. 163. (2) 14 Ch. D. 213.

FRY, L.J.:—

The material question in this case appears to me to turn on the 3rd section of the 2 & 3 Will. 4, c. 71. [His Lordship read the section and proceeded:—] I pause to observe that in my judgment the word "access," as used in that section, does not refer to the access through the orifice—through the aperture or window—but to the freedom of passage over the servient tenement, and I think some confusion has arisen from supposing that the access referred to there is the access through the window of the dominant tenement. Undoubtedly the two are closely connected together, because the right acquired under this section of the statute by the dominant tenement is governed and measured by the access to the dominant tenement, and therefore the aperture which lets the light into the dominant tenement defines in a manner familiar to us all the area which must be kept free over the servient tenement. The two things are closely connected together—the one is the measure of the other—but they are not the same thing.

The next inquiry, which is important, is this: What is the meaning of the word "thereto" in the passage "the right thereto shall be deemed absolute and indefeasible"? It appears to me plain that it must mean the right "to the same access and use of light to and for any dwelling-house, workshop, or other building." It has not been contended, and I think it could not be reasonably contended, that the right was one in gross—that the right was one which could be enjoyed except in connection with a "dwelling-house, workshop, or other building." But it has been contended that the building to enjoy it after the lapse of twenty years must be the same building as that which acquired it during the twenty years, or at the end of the twenty years. The statute says nothing of the sort; it does not say "to the same dwelling-house, workshop, or building." I can see no reason or ground upon principle or authority why we should import such a limitation into the Act. I think, therefore, that the Act is silent as to identity of aperture, and is silent as to identity of building. All the Act does is to give the same sort of access and user of light, and it must certainly not be more than it was before. Through what aperture that light comes in, or for what building

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this light is used, after the expiration of the twenty years is, as far as the statute is concerned, a matter of entire indifference. That is my view of the true meaning of the section. Of course it does not follow that every building erected by the owner of the dominant tenement is entitled to this light. If that building is so placed as that it cannot make use of light passing over the same space as the original building enjoyed, then it does not use the same light "to or for any dwelling-house, workshop, or building," and therefore the alteration in the building, by altering the light which is used, has deprived the new building of the right to enjoy light which it does not use. It does not bring itself therefore within the section. Again, it may well be that the new building may be constructed in such a manner as to shew evidence of intention to abandon for ever the use of the light to which the old building was entitled. In that way the alteration of a building may be of the last importance.

It has been argued in the present case that we have such an alteration, and that the difference between the position of the windows in the new building and those which existed in the old is evidence of intention to abandon for ever any claim to the right to light which existed in the old building. But I am bound to say that I can come to no such conclusion. When you open a window it is very difficult to suppose that you intend to abandon the right to the access of light to the building. When you have closed a window, it may be that the Court or jury might see an intention to abandon the right; but when you maintain, either in its entirety or to a considerable part of it, the old window, it is difficult to suppose that you mean to give up a right to the light which that window or a portion of it enjoyed. The question of abandonment is one of intention, to be gathered from all the circumstances of the case, and looking at all the circumstances of this case I have come to the conclusion that there was an intention to use all the light which the old windows were entitled to use, and no intention to abandon any part of it.

Again, it may well be that the alteration of a building may put an end to the Plaintiff's right in this way, that it has become impossible for him to prove that the access of light he is claiming is the same as that which existed to the old window. Whenever

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such a difficulty of proof arises in the Plaintiff's case by reason of his change in the building, then undoubtedly his right may be lost by the change which he has himself caused. But where the new building does use the same light, avails itself of the same access of light as the old, where there has been no intention of abandonment, and where there has been no loss of evidence and no incapacity to prove the identity of the old light and that which has been interfered with, all of which circumstances in my judgment occur in the present case, then I see nothing in the statute to deprive the owner of the new building of the right to the access of light which existed in the old building.

I think, therefore, that the judgment of Mr. Justice *North* in the present case was right, and the appeal must be dismissed with costs.

Solicitors: *Bonner, Wright, & Co.*, agents for *Ridley, Newcastle; Crossman, Crossman, & Prichard*, agents for *Stanton & Atkinson, Newcastle.*

M. W.

C. A. 1886 Feb. 9.

In re ATKINSON.
ATKINSON *v.* BRUCE.

[1885 A. 473.]

Settled Land Act—Tenant for Life—Persons having Powers of Tenant for Life—Discretionary Trust for Application of Income during Life—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *subs.* 5, 6, 10 (*cl.* i.); *s.* 51; *s.* 58 *sub-s.* 1 (*cls.* vi., ix.).

A trust, although it be to last during the life of *A.*, to apply the rents and profits of an estate for the benefit of *A.* and of his wife and his children, if any, does not constitute *A.* or *A.* and his wife together, a tenant for life of the estate under sect. 2, sub-sect. 6 of the *Settled Land Act*, 1882 or a person with the powers of a tenant for life under sect 58 of that Act.

Decision of *Pearson*, J., affirmed.

The word "possession," in sect. 2, sub-sect. 5, and in sect. 58, sub-sect. 1, is to be read as in antithesis to "remainder" or "reversion."

The words "so entitled," in sect. 2, sub-sect. 6, mean entitled under the direction in the preceding sub-section, i.e. for life.

THIS was an appeal by *J. E. Atkinson* and his wife from a decision of Mr. Justice *Pearson* (1) dismissing a summons, and in

(1) 30 Ch. D. 605.

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effect holding that the Appellants did not together constitute a tenant for life of an estate called the *High Trewitt* estate, or a person with the powers of a tenant for life.

Adam Atkinson, by his will, dated the 26th of May, 1875, devised the *High Trewitt* estate to certain uses which were similar to uses declared of another estate called the *Norbottle* estate, and which were as follows: To the use of the Defendants, *T. D. Bruce* and *A. C. Bruce*, their heirs and assigns, during the life of his son, the Plaintiff, *J. E. Atkinson*, upon trust to receive the rents and profits thereof and manage the same, and after payment of all costs and outgoings incurred in relation to the same, and of the interest on any mortgages, to hold the residue of the rents and profits upon the trusts thereinafter mentioned, and from and immediately after the death of *J. E. Atkinson* to the use of his first and other sons successively in tail male, with divers remainders over. And the testator directed that the trustees should during the life of *J. E. Atkinson* pay and apply the clear residue of any rents and profits of the devised estate which, under the trusts thereinbefore contained, should, during the life of *J. E. Atkinson*, become payable to the trustees, in such manner in all respects as they should think fit for or towards the maintenance and support or otherwise for the benefit of *J. E. Atkinson* and of any wife with whom he might intermarry, and his child or children by her, or for the benefit of any one or more of such objects; and so that in case *J. E. Atkinson* should at any time assign, anticipate, or charge, or attempt to assign, anticipate or charge his interest under the will or any part thereof, or should do any act whereby either directly or by operation of law he would, if absolutely entitled to such interest, be deprived or be liable to be deprived of the benefit or enjoyment thereof, then and immediately thereupon the trust thereinbefore declared in favour of *J. E. Atkinson* should absolutely cease and determine, and the rents and profits should thenceforth during his life be applied by the trustees either for the maintenance and support or benefit of *J. E. Atkinson*, or for such other purposes and in such manner in all respects as the trustees should in their absolute discretion think fit.

The testator died on the 6th of June, 1875. *J. E. Atkinson*

married his present wife in September, 1884. No issue were born at the date of the application on which the order appealed from was made, nor had *J. E. Atkinson* done anything to determine the trust in his favour.

Cookson, Q.C., and *Mulligan*, for the Appellants:—

By force of sect. 2, sub-sects. 5, 6, and 10 (cl. i.), the Appellants, as persons who have for the time being concurrent beneficial interests in the income of settled land during the life of one of them, viz. *J. E. Atkinson*, together constitute a tenant for life.

But if they are not a tenant for life within sect. 2, they are in the position of a person having the powers of a tenant for life under sect. 58, sub-sect. 1 (cls. vi. and ix.). They are two persons having concurrent interests during the life of *J. E. Atkinson*, under a direction (not a power) in the will to receive the income of the settled land. The quantum of interest is immaterial, as is the fact that it may cease on the birth of children, or may be forfeited on the bankruptcy of *J. E. Atkinson*. There is a subsisting direction during his life, and while there is no other object in whose favour the trustees may exclude the Appellants, the Appellants have between them a present as opposed to a reversionary interest, which is the meaning to be given to "possession" both in sect. 2 and sect. 58. Although the amount of this interest cannot be defined distinctly, any interest, however small, if in the nature of a life interest, although determinable on any event, is sufficient to give the person or persons having that interest the powers of a tenant for life under sect. 58: *In re Jones* (1), *In re Clitheroe Estate* (2). The interest of *J. E. Atkinson* is under the terms of the trust such that his trustee in bankruptcy could insist on the money being applied: *Younghusband* v. *Gisborne* (3).

Then sect. 51 prohibits any provision the effect of which would be to exclude the statutory powers of a tenant for life.

Cozens-Hardy, Q.C., and *Dunham*, for the trustees, were not called upon.

(1) 26 Ch. D. 736. (2) 31 Ch. D. 135.
(3) 1 Coll. 400.

C. A. 1886 *In re* ATKINSON. ATKINSON *v.* BRUCE.

COTTON, L.J. :—

This is an appeal from a decision of Mr. Justice *Pearson* holding that the Appellants, Mr. *J. E. Atkinson* and his wife, do not together constitute a tenant for life of the *High Trewitt* estate within sect. 2 of the *Settled Land Act*, 1882, nor a person with the powers of a tenant for life within sect. 58 of that Act.

Mr. *Cookson* has mainly relied on the provisions of sect. 58, so I will take that section first. [His Lordship read sub-sect. 1 and cl. vi. of that sub-section, and proceeded :—] Now, I agree that the words "in possession" in sub-sect. 1 are to be read as contradistinguished from "in reversion" or "in remainder." Clause vi. has been principally used in aid of the argument based on cl. ix. of the same sub-section. [His Lordship read cl. ix., and proceeded :—] I will assume that sub-sect. 6 of sect. 2 applies, and that no difficulty is caused by the fact of there being two persons to constitute a tenant for life. But where is there in the gift in this will any direction to pay to the Appellants or to either of them during the life of the husband or any one else? I will put out of consideration the clause of defeasance on the bankruptcy. It cannot be said that there is any direction for payment to the husband or to the husband and wife during any person's life. It is true that there is a trust, which is to last during the life of the husband, to apply the rents and profits of the hereditaments for the benefit of the husband and wife and their children, if any. It is not therefore a trust for payment to the husband or husband and wife during the life of the husband with a gift over, or forfeiture of the interest in the event of there being children, but merely a direction to pay to these two persons, or one of them, until other objects of the trust come into existence, who will then be included in the class amongst whom the trustees may at their discretion apply those rents and profits. But this is not the same thing as a direction for payment to the husband or wife or either of them during the life of the husband.

Then it is said that clause vi. of that sub-section can be read in aid of clause ix., and that a tenant for his own or any other life, or whose estate is liable to cease in any event during that life, or to be defeated by an executory limitation over, is still entitled to

exercise the powers of a tenant for life. That is true, but we must have the precise case mentioned by the Act. Here there is not to be found anywhere in this trust any direction for payment of income of land to the husband or the husband and wife during any person's life; therefore the Appellants do not come within that sub-section, as would a person who is made tenant for life subject to defeasance of that life interest.

Then sub-sects. 5 and 6 of sect. 2 have been relied on. [His Lordship read those sub-sections and proceeded:—] The two or more persons so entitled in sub-sect. 6 must be persons entitled under the direction in sub-sect. 5. But what I have before said as to the position of the Appellants prevents the husband, and the husband and wife together, from coming under sub-sect. 5, and consequently under sub-sect. 6. I do not think that if there had been a direction to pay to the husband or wife the case would have come under these sub-sections, although possession of land includes receipt of income of land. I cannot think that such a person would have been in the position of a person "beneficially entitled to possession of settled land." The Appellants must come, if at all, within sect. 58; but, for the reasons I have before given, in my opinion they do not.

It is said that sect. 51 prevents our coming to this conclusion, because that section prohibits the insertion in a settlement of any provision the effect of which will be to prevent a tenant for life exercising the powers of the Act. But to make sect. 51 apply you must find in the settlement a limitation which, but for an attempted prohibition, would constitute a tenant for life capable of exercising the powers of the Act. And here the husband has not individually, nor have he and his wife collectively been made a tenant for life, or in the position of a person having the powers of a tenant for life. That section therefore has no application. The appeal must be dismissed.

BOWEN, L.J.:—

I am of the same opinion. I do not think that the Appellants, or either of them, are or is a tenant for life, or a person with the powers of a tenant for life.

C. A. 1886

In re Atkinson. Atkinson *v.* Bruce.

Fry, L.J.:—

I am entirely of the same opinion.

Solicitors for Appellants: *Smiles, Binyon, & Ollard*, agents for *Welchman & Carrick, Wisbeach.*

Solicitors for Trustees: *Crowdy, Son & Tarry.*

M. W.

C. A. 1885

PEARSON, J. *Aug.* 11, 12; *Nov.* 25.

C. A. 1886 *Feb.* 10, 11.

NATIONAL PROVINCIAL BANK OF ENGLAND *v.* GAMES.

[1883 N. 1325.]

Mortgagor and Mortgagee—Foreclosure Action—Equitable Mortgage by Deposit—Costs of Mortgagee.

In an action to foreclose a mortgage by deposit of title deeds, accompanied by a memorandum by which the mortgagor agreed to execute a legal mortgage of his estate and interest at the request of the mortgagee, the Taxing Master disallowed the following charges in the mortgagees' bill of costs:—(1) Costs of an action in the Queen's Bench Division for recovery of the debt. (2) Costs of correspondence with a surety who had given a promissory note for part of the debt. (3) Costs of investigating the mortgagor's title. (4) Costs of preparing a legal mortgage which the mortgagor refused to execute. (5) Costs of correspondence with the mortgagor as to the legal mortgage.

Held, by *Pearson*, J., that heads (1) and (2) must be allowed, but that the Taxing Master was right in disallowing (3), (4), and (5).

Held, on appeal, that a mortgagee is entitled to be allowed in account the costs of all proceedings reasonably taken by him to enforce his rights under the mortgage contract, including proceedings to obtain the mortgage money or any part thereof, either from the mortgagor, or from a surety, or out of the estate, and that therefore heads (2), (4), and (5) must be allowed. That (1) would ordinarily be a proper charge but in the present case it could not be allowed as it was excluded by the special terms of the order directing taxation, and that (3) could not be allowed, as an investigation of the title was not necessary for the purpose of preparing the legal mortgage, but that the mortgagees must be allowed all expenses properly incurred with reference to the preparation of the legal mortgage, which would include the expense of such inspection of the title deeds as was necessary for preparing it.

Ellison v. *Wright* (1) preferred to *Lewis* v. *John* (2).

In December, 1879, *George Games* deposited with the Plaintiffs, who were his bankers, certain deeds and writings, with a memo-

(1) 3 Russ. 458. (2) 9 Sim. 366.

randum of deposit stating that he deposited them as a security by way of equitable charge on the lands comprised in them for the payment of all moneys due or to become due from him to the Bank, including banking charges, "And I agree upon request to execute to your said bank a mortgage of all my estate and interest in the hereditaments and premises comprised in such title deeds and writings, such mortgage to contain a covenant for payment, power of sale, and all other usual clauses."

In 1882 the Plaintiffs commenced an action in the Queen's Bench Division for the balance due from *Games*, and on the 6th of May, 1882, judgment was signed for £1640 8*s.* 8*d.*, and costs to be taxed. The costs were taxed at £8 10*s.* 1*d.*

A Miss *Games* had given a promissory note as surety for part of the balance. After the judgment some correspondence took place with her as to this note. It turned out that her circumstances were such that nothing could be recovered from her.

In 1883 the bank, to whom a considerable sum was still owing, determined to have legal mortgages executed of the different properties comprised in the security. Mortgage deeds were accordingly prepared, and some correspondence with *Games* on the subject took place, but he would not execute them.

In November, 1883, the Plaintiffs commenced this action against *Games* for foreclosure. After the commencement of it *Games* became bankrupt, and the action was revived against his trustee On the 10th of January, 1885, it was ordered by consent that upon payment by the trustee to the Plaintiffs of the sum of £548 7*s.* 6*d.*, the amount due to the Plaintiffs as agreed, together with their costs of the action, including therein any charges and expenses properly incurred by them as mortgagees subsequently to the 6th of May, 1882, to be taxed by the Taxing Master, the action should stand dismissed.

The Plaintiffs carried in a bill of costs, the first part of which, comprising items prior to the commencement of the action, commenced with (1) £8 10*s.* 1*d.*, the costs of the action in the Queen's Bench Division, and included (2) charges for investigating the title of the mortgagor; (3) charges for correspondence with Miss *Games* as to the promissory note; (4) the costs of preparing the legal mortgages; (5) costs of correspondence with the mort-

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gagor as to the legal mortgages. The Taxing Master disallowed the whole of these items. The Plaintiffs carried in objections to this disallowance, as to the first item, on the ground that a mortgagee was entitled to charge against the mortgaged estate costs reasonably incurred in recovering the mortgage debt at law, and as to the subsequent items on the ground that a mortgagee was entitled to charge against the mortgaged estate all costs reasonably incurred in ascertaining and defending his rights, and in seeking to enforce his security.

The Taxing Master overruled the objections and gave the following reasons: "My answer is, that the items disallowed by me are not mortgagees' costs, that is, such costs as mortgagees are entitled to against the property in mortgage. A mortgagee is merely a secured creditor, and is only entitled to party and party costs against the mortgaged property of any action for foreclosure, or to obtain possession, &c. The item £8 10*s.* 1*d.* (taxed costs of judgment in the Queen's Bench in an action by the Bank against *George Games*) is recoverable under the judgment, and does not attach on the mortgaged property. A mortgage deed could not be charged, and in this case of an equitable mortgage the costs of preparation of deeds to give the legal title are in the same position. Those deeds were never executed. All the other items are between solicitor and client, and not between party and party: see *Gregg* v. *Slater* (1), and *French* v. *Baron* (2)."

The Plaintiffs took out a summons to review the certificate. The summons came on for hearing before Mr. Justice *Pearson* on the 11th of August, 1885.

Sir *Arthur Watson*, Q.C., for the Plaintiffs:—

The costs which have been disallowed by the Taxing Master are all proper mortgagee's costs in a foreclosure action, and should have been allowed.

Upjohn, for the trustee in the bankruptcy:—

The Taxing Master's view is right. The mortgagor is not bound to pay the costs of the preparation of a legal mortgage. At any rate those costs are not chargeable against the mortgaged

(1) 22 Beav. 314. (2) 2 Atk. 120.

property. Each party ought to bear his own costs: *Pryce* v. *Bury* (1); *Gregg* v. *Slater* (2); *Fisher* on Mortgages (3). The same principle applies to the costs of investigating the title.

Sir *Arthur Watson*, in reply:—

Ellison v. *Wright* (4) is an authority for allowing the costs of the judgment in the Queen's Bench Division, and the costs of the correspondence with the surety. And that case was followed by *Kindersley*, V.C., in *Merriman* v. *Bonney* (5), in spite of his own doubt as to the propriety of the rule.

Upjohn, in reply as to *Ellison* v. *Wright*:—

That case conflicts with *Lewis* v. *John* (6), which is in accordance with the view expressed by *Kindersley*, V.C., in *Merriman* v. *Bonney*.

1885. Nov. 25. PEARSON, J. (after stating the facts and the nature of the items which the Taxing Master had disallowed, continued):—

As to the costs of the judgment in the action in the Queen's Bench Division, I have no doubt they ought to be allowed. The proceedings were reasonably taken by the mortgagees to obtain payment of what was due to them, and I think they are entitled to their costs of those proceedings.

With regard to the costs of the correspondence with the surety, if the Plaintiffs had taken proceedings against the surety to enforce payment of the promissory note I must have allowed them the costs of their so doing. *Ellison* v. *Wright* is entirely in point as to that. There, "on a bill for redemption, the Master of the Rolls gave to the defendant, the mortgagee, the costs of an action which he had brought against a person who had joined the mortgagor as surety in a bond for the mortgage money, the fruit of the action being lost by the insolvency of the surety; and his Honour stated the principle to be, that the mortgagee was entitled to be allowed in account against the mortgagor, all expenses

(1) 2 Drew. 41.
(2) 22 Beav. 314.
(3) 4th Ed. p. 925.
(4) 3 Russ. 458.
(5) 12 W. R. 461.
(6) 9 Sim. 366.

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properly incurred for the recovery of the mortgage money." That case has been frequently cited, and, so far as I know, it has always been acted upon, except, perhaps, by *Shadwell*, V.C., in *Lewis* v. *John* (1). If the two cases are in conflict, I prefer *Ellison* v. *Wright* (2). The only other case in which any doubt has been thrown upon *Ellison* v. *Wright* is *Merriman* v. *Bonney* (3), in which *Kindersley*, V.C., said (4): "Then, with respect to the question whether the costs of the action" (an action on the mortgagor's covenant to pay interest) "were costs which came within the description" (of costs in relation to the mortgage security) "according to the case of *Ellison* v. *Wright?* That was a question which his Honour should not decide now, the Taxing Master would see what costs were to be properly allowed, and, if any question arose, the Court would be bound to decide it. But he was bound to say that, if it had not been for that case, he should think that they were not costs in relation to the mortgage security." Nevertheless, so far as I have been able to find, though *Ellison* v. *Wright* has been cited before *Knight Bruce*, L.J., Lord *Romilly*, M.R., and *Jessel*, M.R., none of those learned Judges has expressed any doubt as to the correctness of the decision. I think it is consistent with principle, and it is certainly consistent with justice. Therefore, I allow these costs.

The remaining items are the Plaintiffs' costs of the preparation of a legal mortgage and of the investigation of the title to the property, and the question is whether these costs are properly chargeable by a mortgagee against his mortgagor in a foreclosure action. Some very pertinent observations as to this point were made by *Kindersley*, V.C., in *Pryce* v. *Bury* (5). In that case it was held that "on foreclosure of an equitable mortgage of copyholds, the mortgagor, being the person to take the necessary steps for an effectual surrender, must pay the expense of all such steps;" and the Vice-Chancellor said (6), "the common rule of this Court as to an equitable mortgage by deposit is this: by the deposit, the mortgagor contracts that his interest shall be liable to the debt, and that he will make such conveyance or assurance

(1) 9 Sim. 366.
(2) 3 Russ. 458.
(3) 12 W. R. 461.
(4) 12 W. R. 462.
(5) 2 Drew. 41.
(6) Ibid. 42.

as may be necessary to vest his interest in the mortgagee. He does not contract that he will make a perfect title, but he does bind himself to do all that is necessary to have the effect of vesting in the mortgagee such interest as he, the mortgagor, has. Now, if the case were one of an equitable mortgage of freehold, the decree would be that the mortgagor should convey to the mortgagee, without saying at whose expense. In carrying this out, the course would be that the mortgagee would have to prepare a draft and submit it to the mortgagor. When the draft was settled, the mortgagee would have to engross and stamp it, and tender it for execution to the mortgagor, and on that tender being made and refused, and not before, the mortgagor would be guilty of breach of the terms of the decree." The Vice-Chancellor, as it seems to me, has there pointed out what are the respective duties of the mortgagor and the mortgagee in a case of this kind. It is the duty of the mortgagee to prepare the draft of the mortgage, to get it engrossed and stamped, and to tender it to the mortgagor for his execution; and it is the duty of the mortgagor to execute the mortgage when it is tendered to him. I think the Vice-Chancellor implies, as plainly as he could do, that the mortgagee must pay his own costs of preparing, engrossing, and stamping the mortgage deed and tendering it to the mortgagor for execution. On the same ground, I think that the mortgagee ought to pay his own costs of investigating the title. I am the more inclined to this view, because I think it would very much astonish any one if, in the case of a legal mortgage containing a covenant by the mortgagor for further assurance, the mortgagee, if he required a further assurance to be executed by the mortgagor, could call upon the mortgagor to pay all his costs of obtaining the further assurance. I think that the Taxing Master was right in disallowing these items. But I think he ought to have allowed the first two items. As the Plaintiffs have succeeded in part and have failed in part, I give no costs of the summons.

W. L. C.

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The mortgagees appealed from the disallowance of the costs of investigating the title and preparing the mortgage deeds. The

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trustee gave notice against the allowance of the costs of the action in the Queen's Bench Division, and of the correspondence. The appeals were argued on the 10th and 11th of February, 1886.

Sir *Arthur Watson*, Q.C., and *G. S. Barnes*, for the Plaintiffs :—

The costs of preparing the legal mortgages ought to be allowed, and the costs of the investigation of title which was necessary to their preparation. The leading case as to allowances to a mortgagee is *Dryden* v. *Frost* (1), where it was laid down that the Court will give him all costs properly incurred in ascertaining or defending his rights as mortgagee, and Lord *Cottenham* cites the observation of Lord *Eldon*, that the mortgagee must be indemnified to the extent that he acts reasonably with respect to such rights as his mortgage title gives him. These expenses were incurred in a reasonable attempt to perfect the security in a way which had been expressly contracted for. This principle was strongly enforced in *Sutton* v. *Rawlings* (2), where the costs of an abortive attempt at a sale were allowed to the mortgagee. *Waddilove* v. *Taylor* (3) goes on the same principle. The observation of Vice-Chancellor *Kindersley* in *Pryce* v. *Bury* (4) at first sight appears to be opposed to my contention; but the case is quite different. A decree for foreclosure absolute had been made, the relation of mortgagor and mortgagee had ceased, and the mortgagor could not be called upon to convey the legal estate at his own expense.

[COTTON, L.J. :—Is not the contract here that the Defendant will convey by way of mortgage such estate as he has? What need had you then to investigate the title?]

An investigation of the title would be necessary to enable the mortgagees to frame their mortgage deed properly, though not such a thorough investigation as would be made by an intending mortgagee before advancing his money. At all events we ought to have the costs of preparing the mortgage deeds.

Upjohn, for the trustee in bankruptcy :—

[COTTON, L.J. :—We do not call upon you as to the costs of

(1) 3 My. & Cr. 670.
(2) 3 Ex. 407.
(3) 6 Hare, 307.
(4) 2 Drew. 41.

investigating the title to see whether it was a good one. But we will hear you as to the costs of looking at the deeds for the purpose of ascertaining what was to be conveyed, and as to the costs of preparing the legal mortgage, and of endeavouring to procure the execution of it.]

Sir *A. Watson* commenced with the general rule in *Dryden* v. *Frost* (1), but that rule does not determine what the contract is to be considered as giving to the mortgagee. Here I say it gave him a charge, and an undertaking to execute a legal mortgage when required, but not a word is said as to its being prepared at the mortgagor's own expense. I contend that the contract only made it the duty of the mortgagor to execute a legal mortgage when tendered to him, and not to pay for its preparation.

[COTTON, L.J., referred to the observation of Lord *Eldon*, cited by Lord *Cottenham* in *Dryden* v. *Frost* (2).]

I contend that as regards the preparation of a legal mortgage the Plaintiffs were not acting as mortgagees, but as parties entitled to the benefit of a contract which they were seeking to enforce.

[FRY, L.J.:—Lord *Eldon* says that the mortgagee is to be indemnified, *i.e.*, allowed in account with the mortgagor to the extent that he acts reasonably as mortgagee. Were not the mortgagees acting reasonably here in applying for a legal mortgage?]

I submit that the remark of Lord *Eldon* applies to acts done for the benefit of the property between the mortgagee and third parties, and does not apply to dealings between the mortgagor and mortgagee. *Pryce* v. *Bury* (3) really decides the question in my favour.

[FRY, L.J.:—The surrender in that case was not under a contract but on final foreclosure: *Seton* on Decrees (4).]

I say in the next place that if there is any agreement to pay these costs it is only a personal agreement not binding the property.

[FRY, L.J., referred to the terms of the order of the 10th of January, 1885.]

(1) 3 My. & Cr. 670.
(2) Ibid. 670, 675.
(3) 2 Drew. 41.
(4) 4th Ed. 1127.

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It refers to "costs incurred by them as mortgagees," not to "costs of the mortgagees." Costs of completing the relation of mortgagor and mortgagee do not stand on the same footing as costs incurred in defending the property. Take the case of a legal mortgage. The mortgagee's costs are usually deducted out of the mortgage money. If this has not been done, then if the mortgagee pays his own solicitor he can sue the mortgagor for the amount, but there is no authority that he can charge them on the property, and *Gregg* v. *Slater* (1) seems to shew that he cannot. I submit that the mortgagee is only entitled to costs which, after his title as mortgagee is completed, he incurs in defending the estate.

[COTTON, L.J.:—The mortgagees here were mortgagees from the time of the deposit, and the getting in the legal estate seems to be very similar to the getting a stop order in *Waddilove* v. *Taylor* (2).]

Then as to the action in the Queen's Bench Division and the correspondence, I contend that these were not costs incurred by the Plaintiffs as mortgagees, but merely as creditors.

[FRY, L.J.:—Mortgagees are creditors.]

No doubt; but as they unite in themselves two characters—those of creditors and of persons holding a security—it does not follow that every act done by them shall be an act done by them as mortgagees. In *Lewis* v. *John* (3) a mortgagee was not allowed as against the estate the costs of an action brought by him for the debt against the personal representative of the mortgagor. *Ellison* v. *Wright* (4) is opposed to this, but Vice-Chancellor *Kindersley*, in *Merriman* v. *Bonney* (5), expressed his inclination in favour of *Lewis* v. *John*.

[COTTON, L.J.:—Ought not the mortgagee to be allowed the costs of an action which he reasonably brings, and the effect of which if successful would be to diminish the charge on the property?]

A man cannot be said to be bringing an action as mortgagee

(1) 22 Beav. 314.
(2) 6 Hare, 307.
(3) 9 Sim. 366.
(4) 3 Russ. 458.
(5) 12 W. R. 461; 10 Jur. (N.S.) 534.

when there is not the slightest reference in the proceedings to the security. How could any steps as regards the surety be taken by the Plaintiffs as mortgagees? The claim against the surety had nothing to do with the security. Then as regards the action in the Queen's Bench Division, these costs are not within the terms of the order, as they were not incurred after the 6th of May, 1882.

Barnes, in reply, was directed to confine himself to the costs of the correspondence with the surety and of the action in the Queen's Bench Division.

Lewis v. *John* (1) does not conflict with *Ellison* v. *Wright* (2). The action in *Lewis* v. *John* against the executrix ought not to have been brought without inquiry, which would have prevented the taking a fruitless proceeding. *Ellison* v. *Wright* has been referred to without disapprobation in *Peers* v. *Ceeley* (3), *Horlock* v. *Smith* (4), and *Wilkes* v. *Saunion* (5).

Upjohn, in reply on the cross-appeal:—

Lewis v. *John* does not appear to have proceeded on the ground that the action was imprudently brought. [The Court assented to this.]

COTTON, L.J.:—

We have in this case an appeal and a cross-appeal. I shall consider first the original appeal, which raises the more important question. An equitable mortgage was made to bankers by a deposit of title deeds, with a memorandum which contained this stipulation by the mortgagor: "I agree upon request to execute to your said bank a mortgage of all my estate and interest in the hereditaments and premises comprised in such title deeds and writings, such mortgage to contain a covenant for payment, power of sale, and all other usual clauses." After some time, and after an action had been brought by the Bank for the balance due to them, in which action they obtained judgment, but did

(1) 9 Sim. 366.
(2) 3 Russ. 458.
(3) 15 Beav 209.
(4) 1 Coll. 298.
(5) 7 Ch. D. 188.

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not obtain full payment, they determined to apply for a legal mortgage under this agreement. Part of the costs now in dispute are the costs of investigating the title to the mortgaged properties, and of preparing the mortgage deeds. The rule as to a mortgagee's costs is stated by Lord *Cottenham* in *Dryden* v. *Frost* (1) in these terms: "The Court, in settling the account between a mortgagor and mortgagee, will give to the latter all that his contract, or the legal or equitable consequences of it, entitle him to receive, and all the costs properly incurred in ascertaining or defending such rights, whether at law or in equity. . . . In *Detillin* v. *Gale* (2) Lord *Eldon* says that he ought to be indemnified to the extent that he acts reasonably as mortgagee; which must mean reasonably with respect to such rights as his mortgage title gives him." Here the direction to tax the costs of the Plaintiffs as mortgagees must mean all such costs as they, being mortgagees, have properly incurred in respect to their position as mortgagees. A mortgagee does not in terms contract for costs, but the rule is that all costs which he, being mortgagee, properly incurs in relation to his security, are to be allowed him. Now, having regard to the nature of the contract, I think it was wrong for the Plaintiffs to investigate the title for the purpose of seeing whether the mortgagor had a good title. They would, it is true, need to look into the title deeds to a certain extent so as to see how the legal mortgage was to be framed; but that is a very different matter from investigating the title. If they came to sell, an investigation of title would be necessary; but no such investigation was required before taking a legal mortgage, for the contract was that the mortgagor would grant a mortgage of his estate and interest in the property, and they could only call for a mortgage of such estate and interest as he had. The costs, therefore, of ascertaining whether the mortgagor had a good title ought not to have been incurred and cannot be allowed. The costs of preparing the legal mortgage must, in my opinion, be allowed. It has been argued that the rule as to the costs of a mortgagee does not apply to proceedings between him and the mortgagor. I cannot agree with that contention. If a proceeding is taken to enforce the contract against

(1) 3 My. & Cr. 670, 675. (2) 7 Ves. 583, 585.

the mortgagor, those costs, if properly incurred, come within the rule, being costs properly incurred in attempting to enforce the rights given by the mortgage contract. The costs of the correspondence with the mortgagor stand on the same footing.

Then as to the costs of the correspondence with Miss *Games* and the costs of the action to recover the mortgage debt, I am of opinion that the Plaintiffs, as mortgagees, are entitled to the costs of this correspondence. That correspondence and that action were steps taken by the Plaintiffs as creditors holding a mortgage security, with a view to recovery of the money for which the security was given, and their tendency was to exonerate the mortgaged estate. I think, therefore, that the costs of proceedings, whether by action or otherwise, to recover the mortgage debt or any part of it, are costs relating to the mortgage debt, though not to the mortgage security, and come within the rule. As regards the authorities on this class of costs, I prefer *Ellison* v. *Wright* (1) to *Lewis* v. *John* (2) and *Merriman* v. *Bonney* (3), so far as the latter two cases throw doubt upon the first; and I am glad to find that in the note to *Seton* on Decrees (4) the law is laid down in terms which are I think justified by the authorities. "Both in foreclosure and redemption actions the mortgagee is entitled to the costs of suit, and also to all costs properly incurred by him in reference to the mortgaged property, for its protection or preservation, recovery of the mortgage money, or otherwise relating to questions between him and the mortgagor, and to add the amount to the sum due to him on his security."

In the present case, however, I do not see how the £8 10*s.* 1*d.*, the costs of the action in the Queen's Bench Division, can be allowed. The consent order provides for allowing only charges and expenses incurred subsequently to the 6th of May, 1882, and nearly the whole of this amount was incurred before that day. On this ground I think that the Master was right in disallowing that item, but the costs of the correspondence must be allowed.

BOWEN, L.J.:—

I am of the same opinion. I think that all costs are to be allowed to a mortgagee which he, after becoming such, reasonably

(1) 3 Russ. 458.
(2) 9 Sim. 366.
(3) 12 W. R. 461.
(4) 4th Ed. p. 1059.

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incurs in relation to the mortgage debt. I think also that the costs of any further investigation of title than was necessary to enable the mortgagees to prepare the mortgage deeds were not costs reasonably incurred.

FRY, L.J. :—

Five heads of items in the bill of costs of the mortgagees are in contest on the present occasion.

First, the costs of investigating the title. If the contract had entitled the Bank to call upon the mortgagor to get in the legal estate wherever it was, an investigation of title might have been necessary; but as he only agreed to mortgage his estate and interest, it was unnecessary to look into the title any further than to see in what form the mortgages ought to be drawn. I think, therefore, that these costs cannot be allowed.

Secondly, the costs relating to the preparation of the legal mortgages. It has been contended that the rule that a mortgagee is to have his costs does not apply to the costs of proceedings between the mortgagor and mortgagee. I cannot take that view. The Plaintiffs had an equitable mortgage containing an agreement to execute a legal mortgage. They reasonably demanded a legal mortgage, and I think that their costs in relation to it ought to be allowed. They will be allowed any charges and expenses properly incurred in or in reference to the preparation of the drafts, which will give them all they are entitled to in respect of such inspection of the deeds as was necessary.

Thirdly, the costs of the action in the Queen's Bench Division. Judgment in that action was signed on the 6th of May, 1882. The costs, therefore, had been incurred before that day, though not taxed till afterwards; and as the consent order gives only charges and expenses incurred after the 6th of May, I think that these costs cannot be allowed.

Fourthly, costs of correspondence with Miss *Games* as to her promissory note; and, fifthly, costs of correspondence with the mortgagor as to granting legal mortgages. Mr. *Upjohn* contends that a mortgagee has two distinct positions, that of a creditor and that of a person holding a security, and that what he does in respect of a surety who has given a promissory note is done by him in the character of creditor simply, not in that of mortgagee, and is

not chargeable against the mortgaged property. I cannot assent to this. A mortgagee is a creditor, he has also a security for the debt, and whether he is trying to get his money from the mortgagor, or from a surety, or out of the mortgaged property, he is trying to enforce his rights as mortgagee. I am therefore of opinion that the costs of the correspondence with the surety must be allowed. The costs of the correspondence with the mortgagor are even more clearly relative to the position of the Plaintiffs as mortgagees.

Solicitors for Plaintiffs: *Wilde, Berger, & Moore.*

Solicitors for Defendant: *Schultz & Son,* agents for *Gwilym & Charles James, Merthyr Tydvil.*

H. C. J.

SMITH *v.* DAVIES.

[1883 S. 5642.]

Appeal—Time—Foreclosure—Rules of Supreme Court, 1883, *Order* LVIII. *r.* 15.

Under Rules of the Supreme Court, 1883, Order LVIII. r. 15, an order in the ordinary form of a foreclosure judgment, made under Order XV., is, for the purpose of an appeal from it, to be treated as a final order, and it can be appealed from at any time within a year, and the appeal can be heard though, since the notice was served, the foreclosure has been made absolute.

THIS was a foreclosure action. The order *nisi* was dated the 5th of December, 1884 (1). The Chief Clerk's certificate was made on the 19th of February, 1885. The Defendants failed to pay the amount which had been found due to the Plaintiffs on the 19th of August, 1885, the day appointed. On the 30th of October, 1885, the Defendants served notice of appeal from the order of the 5th December, 1884. On the 2nd of November, 1885, on the motion of the Plaintiffs, the foreclosure order was made absolute. On the 5th of November the appeal was entered.

The Appellants in person.

F. T. Procter, for the Plaintiffs, objected that the order

(1) 28 Ch. D. 650.

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appealed from was an interlocutory order, and that consequently the appeal had been brought too late. There could not be two final judgments in the same action, and the foreclosure order absolute was the final judgment.

LINDLEY, L.J.:—

I think the order was not an interlocutory order for the purpose of determining the time for appealing from it.

LORD ESHER, M.R., and LOPES, L.J., concurred.

The appeal was then heard on its merits, and was dismissed with costs. The point that the order was made under Order XV. was not raised.

Solicitor for Plaintiffs: *H. P. Cobb.*

W. L. C.

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In re ANSTIS. CHETWYND *v.* MORGAN.

[1882 A. 1751.]

MORGAN *v.* CHETWYND.

[1882 A. 1729.]

Settlement—Covenant to settle after-acquired Property—Volunteer claiming benefit of Covenant—Maxim, "Equity looks on that as done, which ought to be done"—Power—Defective Execution, curing.

The maxim that Equity looks upon that as done which ought to be done applies only (in cases depending on contract) in favour of persons who are entitled to enforce the contract, and cannot be invoked by volunteers.

By a marriage settlement executed in 1853, certain personal estate was assigned to trustees upon trust in case the husband should die in the lifetime of the wife, and there should be no children of the marriage, to stand possessed thereof for the wife, her executors, administrators and assigns. The settlement contained a covenant by the husband and wife that any real estate to which the wife should become entitled, whether in possession, reversion, remainder, or expectancy, or over which she should have an absolute power, should be assured to the trustees to be held by them upon the same trusts as the above mentioned personal estate, or as near

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thereto as the nature of the property would admit of, and until so assured should be subject to the trusts and enjoyed accordingly. By a deed executed in 1873, certain lands called the *Stonehouse* property were conveyed to trustees for the wife during the joint lives with restraint on anticipation, remainder to her for life, remainder as she should by deed or will appoint, and in default of appointment to the husband in fee. By a codicil to her will made in her husband's lifetime the wife devised the *Stonehouse* property to two persons. The husband died in May, 1882, and the wife in the month of June following. She never republished her will or codicils. There were no children of the marriage, and the *Stonehouse* property was never assured to the trustees on the trusts of the marriage settlement. In an action to administer the real and personal estate of the wife:—

Held, that the covenant to assure after-acquired property could not be enforced or treated as operative in favour of the heir-at-law, that the declaration of trust annexed to it could not be regarded in his favour as a defective execution of a power which the Court would cure, and that the codicil being a good execution of the power of appointment contained in the deed of 1873, the two devisees therein-mentioned were entitled to the *Stonehouse* property.

BY an indenture dated the 30th of September, 1853, and made between the Rev. *Matthew Anstis* of the first part, *Maria Elizabeth Anstis*, then *Maria Elizabeth Grimes*, of the second part, and *William Henry Chetwynd*, *George Salt*, *Bernard Anstis*, and *John Duke Coleridge*, of the third part, being the settlement made on the marriage then intended and afterwards solemnized between *Matthew Anstis* and *Maria Elizabeth Anstis*, she assigned unto the said *W. H. Chetwynd*, *G. Salt*, *B. Anstis*, and *J. D. Coleridge*, one fourth share and all other, if any, the share and interest in the sum of £5000, to which she was entitled on the decease of Dame *Hannah Maria Chetwynd*, under the settlement therein referred to, and also the dividends, interest, and annual proceeds of one moiety of the sums of £7500, £2500, and £2500, to which *M. E. Anstis* was entitled during her life as therein mentioned, and also the other moiety of the last mentioned sums to which she was then absolutely entitled, and the interest, dividends, and annual proceeds thereof, to hold the same in trust for the said *M. E. Anstis* until the said intended marriage, and after the solemnization thereof, upon the trusts and subject to the powers hereinafter declared concerning the same: and it was thereby declared that the said *W. H. Chetwynd*, *G. Salt*, *B. Anstis*, and *J. D. Coleridge* should stand possessed of the one-fourth share of the said sum

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of £5000, and also the moiety of the said sums of £7500, £2500, and £2500 thereinbefore assigned, and the interest thereof, upon trust to invest and vary the investments as therein mentioned and to pay the income of such investments to the said *M. Anstis* and *M. E. Anstis* successively for their respective lives, and after the death of the survivor of them, then as to capital and income upon the trusts therein mentioned for the issue of the marriage; and it was thereby agreed that in case there should be no child of the marriage who being a son should attain the age of twenty-one years, or being a daughter should attain that age or marry, the trustees or trustee for the time being of the said settlement should stand possessed of the said trust-moneys and investments and annual produce thereof, or so much thereof respectively as should not have become vested or been applied under any of the trusts or powers therein contained, upon the trusts following; in case *Matthew Anstis* should die in the lifetime of *Maria Elizabeth Anstis*, then from and after his death, and such default or failure of children as aforesaid which should last happen, in trust for the said *Maria Elizabeth Anstis*, her executors, administrators, and assigns; but in case she should die in the lifetime of the said *Matthew Anstis*, then, from and after his death and such default or failure of children as aforesaid, which should last happen, upon such trusts as the said *M. E. Anstis* should, notwithstanding her coverture, by will or codicil appoint, and in default of such appointment, and so far as no such appointment should extend, upon the trusts therein mentioned.

The indenture contained the following covenant: "And each of them the said *Matthew Anstis* and *Maria Elizabeth Grimes* for himself and herself, his and her heirs, executors, and administrators, doth hereby covenant with the said *W. H. Chetwynd*, *G. Salt*, *B. Anstis*, and *J. D. Coleridge*, their executors and administrators, that if the said intended marriage shall be solemnized, all the estate, property, and effects whatsoever, real and personal, if any, not hereby settled, to the amount or value of £300 to which the said *Maria Elizabeth Grimes* now is, or of the like amount or value at any one time to which the said *Maria Elizabeth Grimes* or the said *Matthew Anstis* in her right shall at any time or times during the said intended coverture become seised or possessed

of or entitled to either at law or in equity, for any estate or interest whatsoever, in possession, reversion, remainder, or expectancy, other than any jewels, trinkets, ornaments, prints, pictures, or books, or other moveables, under any gift, devise, or bequest in her favour, or by descent, representation, or other means whatsoever, or over which the said *Maria Elizabeth Grimes* shall or may have an absolute power of appointment, shall be assured and settled, and that the said *Matthew Anstis* and *Maria Elizabeth Grimes* at the costs and charges of the said trust estate shall do, execute, and concur in doing and executing all such acts and deeds whatsoever as by the trustees or trustee for the time of these presents, or their or any of their counsel in the law, shall be reasonably desired or required, for assuring and settling the same and every part thereof for all the estates and interests of the said *Matthew Anstis* and *Maria Elizabeth Grimes*, or either of them, in her right, upon the same trusts, and for the same intents and purposes, and under and subject to the same powers, provisoes, and agreements, as are hereinbefore expressed and declared concerning the said one fourth share of the said £5000, and the moiety of the said sums of £7500, £2500, and £2500, hereby settled, or such of the said trusts, intents, and purposes, powers, provisoes, and agreements, as shall be then subsisting and capable of being executed, or as near thereto as the nature of the property and the circumstances will admit of, and that until the said estate, property, and effects, shall be so settled and assured as aforesaid, the same shall be subject to such trusts, powers, provisoes, and agreements as aforesaid, and shall be enjoyed accordingly."

By an indenture dated the 7th of November, 1873, and made between *Charlotte Sparrow* of the one part, and *Hervey Charles Bagot* and *Thomas Salt* of the other part, after reciting that *Charlotte Sparrow* was seised in fee of the messuage, farm, lands, and hereditaments intended to be thereby granted and conveyed, and that she was desirous of making some provision for her niece, *M. E. Anstis*, it was witnessed that she, *Charlotte Sparrow*, did grant and convey unto *Hervey Charles Bagot* and *Thomas Salt* the messuage, farm, lands, and hereditaments, hereinafter called the *Stonehouse* property, "To have and to hold the said messuage, farm, lands, hereditaments, and all other the premises hereby

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conveyed or intended so to be unto the said *Hervey Charles Bagot* and *Thomas Salt* and their heirs to the uses following, that is to say, to the use of the said *Hervey Charles Bagot* and *Thomas Salt*, their executors, administrators, and assigns, during the joint natural lives of the said *Matthew Anstis* and *Maria Elizabeth*, his wife, upon trust that the said *Hervey Charles Bagot* and *Thomas Salt*, and the survivor of them, and the executors, administrators, and assigns of such survivor do and shall during such joint natural lives pay the yearly rents and profits of the said messuages, farm, lands, and hereditaments to such person or persons, and for such intents and purposes as the said *Maria Elizabeth Anstis* by any writing under her hand, but not in any mode of anticipation, shall from time to time appoint, and in default of and until such direction into her own proper hands for her sole and separate and inalienable use, independently of her said husband, and without being in anywise subject to his debts or control, and for which said rents and profits her receipts shall be good and effectual discharges, and if the said *Maria Elizabeth Anstis* shall happen to survive the said *Matthew Anstis*, to the use of the said *Maria Elizabeth Anstis* and her assigns for and during the residue of her natural life and from and after the decease of the said *Maria Elizabeth Anstis*, whether she shall survive the said *Matthew Anstis* or die in his lifetime, To the use of such person or persons for such estate or estates, and upon and for such trusts, intents, and purposes, and generally in such manner and form as the said *Maria Elizabeth Grimes* shall from time to time, notwithstanding her present or any future coverture, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be sealed and delivered by her in the presence of and attested by one or more credible witness or witnesses, or by her last will and testament, or any codicil thereto, direct or appoint, and in default of any such direction or appointment, and so far as any such direction or appointment, if incomplete, shall not extend to the use of the said *Matthew Anstis*, his heirs and assigns for ever."

M. E. Anstis made a will and four codicils during the lifetime of her husband; by the fourth codicil, which was dated the 25th of April, 1882, she left *R. G. Ellison* and *J. C. Salt* residuary

legatees of any property to which she was entitled then or thereafter.

Matthew Anstis died on the 5th of May, 1882. *Maria Elizabeth Anstis* died on the 3rd of June, 1882, without having revoked or altered her will or codicils, except so far as any preceding codicil was revoked or altered by any subsequent codicil, but without having confirmed the same or any of them since the death of her husband. *M. E. Anstis* never had any issue by *Matthew Anstis*. Sir *George Chetwynd* was her heir-at-law.

The action, *Chetwynd* v. *Morgan*, was brought to have certain undisposed of personal estate of *M. E. Anstis* administered by the Court; the action, *Morgan* v. *Chetwynd*, was brought to have the real and personal estate of *M. E. Anstis*, and the real and personal estate over which she had any testamentary power of disposition, and which she did dispose of accordingly, administered by the Court.

Vice-Chancellor *Bacon* held that the *Stonehouse* property passed under the will and codicils of *M. E. Anstis*.

Sir *George Chetwynd* appealed.

The appeal was heard on the 30th of January, 1886.

Macnaghten, Q.C. (*T. H. Robertson* with him), for Sir *George Chetwynd*:—

The question is whether Mrs. *Anstis*, having had no children, died intestate: she made a will and four codicils during her husband's lifetime, but she did not republish them after his death, and, therefore, they could operate only upon her separate property and upon property over which she had a power of appointment: this is clear from *Willock* v. *Noble* (1). The marriage settlement contained a covenant to convey the after-acquired property to the trusts of the settlement: the *Stonehouse* property ought to have been, but was not in fact, thus conveyed; nevertheless the maxim, "Equity looks upon that as done which ought to have been done," applies, and the *Stonehouse* property must be treated as subject to, and bound by, the trusts of the marriage-settlement, under which, on her husband's death, and in the events which happened, she took in fee. Therefore at the time of her death

(1) Law Rep. 7 H. L. 580.

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Mrs. *Anstis* must be considered to have been seised in fee simple of the *Stonehouse* property of which she had made no valid disposition by will, and Sir *George Chetwynd* is entitled to it as her heir-at-law. It is admitted on behalf of Sir *George Chetwynd* that the words of the codicil, dated the 25th of April, 1882, are sufficient to pass real estate.

Hemming, Q.C., and *Ingle Joyce*, for the devisees:—

No volunteer is entitled to enforce the performance of a covenant to convey after-acquired property contained in a marriage settlement, and an heir-at-law is a mere volunteer, he is not within the consideration of the settlement, the object of which was to make a provision for the husband and wife during their respective lives and after their deaths for the children of the marriage: *Mackie* v. *Herbertson* (1). For Sir *George Chetwynd* it has been argued that he is entitled to the *Stonehouse* property as heir-at-law by force of the maxim, that "Equity looks upon that as done which ought to have been done." That maxim can be enforced only in favour of persons having what is called a meritorious title, and cannot be invoked by volunteers. In *Pulteney* v. *Earl of Darlington* (2) an attempt was made so to extend its operation, and Lord *Thurlow* described such an abuse of the maxim as the mere use of a cant expression. In the present case after the husband's death the trustees of the settlement could not have compelled the widow to perform the covenant, for they had become bare trustees of the covenant for her: the *Stonehouse* property was then in her possession, and "was at home," to use the phrase employed by Lord *Eldon* in *Wheldale* v. *Partridge* (3). The property became the widow's absolutely, and she had a right to treat the covenant as cancelled, and Sir *George Chetwynd*, not being one of the objects of the covenant, cannot enforce it. As to the proviso at the end of the covenant, that after-acquired property until it is settled shall be subject to the trusts of the settlement, it seems little more than mere surplusage; the object of it merely was that if there should be delay in the performance of the covenant the parties interested should not be injured by losing intermediate benefits.

(1) 9 App. Cas. 303. (2) 1 Bro. C. C. 223, 237; affirmed 7 Bro. P. C. 530.
(3) 8 Ves. 227, 235.

Moreover, it may be questioned whether such an interest as Mrs. *Anstis* took is within the scope of the covenant. In *Hilbers* v. *Parkinson* (1) it was held that an estate tail would not be so, because its conveyance as a whole could not be compelled, and the Court would not enforce a partial conveyance. So here Mrs. *Anstis* had no power to convey her life interest by reason of the restraint, and the Court would not have compelled her to exercise her power over the reversion.

Further, even if the *Stonehouse* property is to be treated as if it had been duly conveyed, the heir-at-law would have no equitable estate in it, the property was merely subject to an equity; under the trusts of the marriage settlement the personal representatives, and not the heir-at-law, would be entitled to it.

Lastly, this is not a case of an equitable estate; under the settlement of 1873, after the husband's death the widow had the legal estate for her life, and her devisees take the legal estate in the fee simple by virtue of the exercise of the power of appointment contained in that settlement. No trust exists in favour of the heir-at-law.

Macnaghten, in reply:—

The expression "at home" is not used in cases relating to covenants as to after-acquired property: it is applied to cases of conversion: the authorities cited as to this expression relate to that doctrine. Sir *George Chetwynd* is not within the difficulty suggested by the counsel for the devisees, that he is a stranger to the consideration of the marriage settlement; it is unnecessary for him to ask that it may be decided that the covenant shall be performed. The covenant was supported by a valuable consideration, and therefore was a defective execution of the power contained in the deed of 1873 which the Court will cure: *Affleck* v. *Affleck* (2). Under the combined effect of the settlements of 1853 and 1873 Mrs. *Anstis* took the fee simple in the *Stonehouse* property upon her husband's death, and as the land was bound by the covenant to convey after-acquired property in equity she took it absolutely, and therefore it passed to her heir-at-law.

(1) 25 Ch. D. 200. (2) 3 Sm. & Giff. 394.

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Hemming, in reply, on *Affleck* v. *Affleck* (1), pointed out that the case turned on the fact that the person seeking to cure the defective execution was within the consideration, and not, as here, a mere volunteer.

1886. Feb. 15. LINDLEY, L.J.:—

The question raised by this appeal is, whether certain lands in *Staffordshire*, known as the *Stonehouse* property, belonged to Mrs. *Anstis* on her death and descended to the Appellant as her heir, or whether she had only a power of appointment over them, in which case the Appellant is not entitled to the property. If they were her property, then, although she made a will and codicils, yet having made them whilst her husband was alive, and not having republished or confirmed them after his death, they must be held inoperative as to this property, and the Appellant as her heir-at-law will be entitled to it (2). On the other hand, if the property was not hers, it is conceded that she had a power to dispose of it by will even during marriage, and that her will and codicils will have operated upon the property under her testamentary power of disposition, and that the Appellant will in this case not be entitled to it.

Whether the *Stonehouse* property was Mrs. *Anstis's* or not depends on two points, namely, first, whether it was within the terms of the covenant to settle after-acquired property contained in Mrs. *Anstis's* marriage settlement; secondly, whether, if the property was within the terms of that covenant, it had actually become or ought to be treated as having become subject to the trusts of the marriage settlement.

In order to determine the first point it is necessary to examine the two deeds of the 30th of September, 1853, and the 7th of November, 1873.

[The learned Lord Justice referred at length to the material provisions of the two deeds.]

Now the words of the covenant to settle after-acquired property, contained in the settlement of 1853, are sufficient to apply to Mrs. *Anstis's* power to appoint the *Stonehouse* property. It is

(1) 3 Sm. & Giff. 394. (2) See *Willock* v. *Noble*, Law Rep. 7 H. L. 580.

true that the interest of Mrs. *Anstis* in the *Stonehouse* property during the joint lives of herself and her husband could not be affected by the covenant in the deed of 1853, inasmuch as neither she nor her husband could dispose of that interest. But this circumstance does not prevent the covenant from extending to the interest she could dispose of under the power given to her by the deed of 1873. The case is not like *Hilbers* v. *Parkinson* (1), where it was held that a covenant to settle after-acquired property did not extend to an estate tail, nor oblige the tenant in tail to convey the property to the trustees of the settlement for his life. In that case the interest of the tenant in tail was one and indivisible; and if the covenant did not extend to the estate tail, it could not extend to an inseparable part of it. The covenant in the marriage settlement of 1853 extended to all property in possession, remainder, or reversion, over which Mrs. *Anstis* should during coverture acquire an absolute power of appointment; and, as in 1873 she did acquire such a power over the *Stonehouse* property, this property must be considered as within the terms of the covenant.

The second point is, whether the *Stonehouse* property was actually subject to, or ought to be treated as subject to, the trusts of the marriage settlement of 1853, when Mrs. *Anstis* died. It must be borne in mind that there never were any children of the marriage, that Mr. *Anstis* died in May, 1882, and Mrs. *Anstis* a month afterwards. Now in fact she never did exercise the power conferred upon her by the deed of 1873, so as to make the *Stonehouse* property subject to the trusts of the marriage settlement of 1853; and if that property is to be treated as actually subject to those trusts, it must be so because the covenant in the deed of 1853 rendered that property so subject. The covenant, however, could not have that effect except in favour of some person entitled to enforce its performance. Equity, no doubt, looks on that as done which ought to be done; but this rule, although usually expressed in general terms, is by no means universally true. Where the obligation to do what ought to be done is not an absolute duty, but only an obligation arising from contract, that which ought to be done is only treated as done in favour of some person entitled

(1) 25 Ch. D. 200.

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to enforce the contract as against the person liable to perform it. No doubt in Mr. *Anstis's* lifetime, he or the trustees of the settlement might have enforced the covenant and have insisted on its performance with reference to the *Stonehouse* property. But when he died Mrs. *Anstis* was the only person entitled to enforce it, and she and her husband's heirs (who might have claimed the property under the deed of 1873 in default of appointment by Mrs. *Anstis*,) were the only persons liable to perform it. Her husband's heirs, however, had practically no interest in the matter, as Mrs. *Anstis* could appoint the property away from them by deed or will, and they were entirely at her mercy. Mrs. *Anstis*, therefore, had no interest in enforcing her rights under the settlement of 1853 as against the heirs of her husband. Considering on the one hand the position of the parties entitled to enforce the covenant contained in the marriage settlement of 1853, and considering on the other the position of the parties against whom it was enforceable, it appears to me that the maxim, "Equity looks upon that as done which ought to have been done," is inapplicable to this case; and that although the *Stonehouse* property was within the terms of the covenant in the marriage settlement, it had not in point of law become actually subject to the trusts of that settlement, and that after Mr. *Anstis's* death there was no ground for treating it as so subject. The declaration of trust at the end of the covenant is part of it, and has no independent operation. Moreover, the fee simple of the *Stonehouse* property was not under the deed of 1873 vested in Mrs. *Anstis*, and could not therefore literally be subject to the trusts of the marriage settlement of 1853, although, as already pointed out, Mrs. *Anstis's* power of appointment was comprised in the earlier part of the same covenant. The *Stonehouse* property not then being actually Mrs. *Anstis's* property when she died, and there being after her husband's death no one but herself entitled to treat it as hers, the Appellant as her heir-at-law has no right to it, unless he is entitled to insist that she ought to be treated as having done that which she in fact never did, namely, as having exercised her power under the deed of 1873 so as to subject the *Stonehouse* property to the trusts of the marriage settlement of 1853. But the Appellant appears to me to have no such right. The covenant

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was not entered into for his benefit in any way; he could never have enforced it against Mrs. *Anstis*, and her death has conferred no such right upon him. He cannot enforce any equitable right of hers, which she in effect declined to enforce herself. He has no independent rights of his own, and has no equity against her appointees. As against them he is in no better position than a volunteer, in whose favour an executory trust will not be enforced. *Affleck* v. *Affleck* (1) was referred to for the purpose of shewing that a covenant to exercise a power would be treated as a defective execution of it. But in that case the person seeking the benefit of that doctrine was the person who had, so to say, bargained for the covenant, and for whose benefit it had been entered into. The Appellant here is in no such position.

In my opinion, therefore, the appeal ought to be dismissed with costs.

LORD ESHER, M.R., and LOPES, L.J., concurred.

Solicitors: *Thomas White & Sons; Frere, Forster, & Co.*

J. E. H.

In re WOOD'S ESTATE. *Ex parte* HER MAJESTY'S COMMISSIONERS OF WORKS AND BUILDINGS.

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Costs—Jurisdiction—Discretion of Court—Compulsory Purchase of Land by Public Body—Payment of Purchase-money into Court—Application for Payment out to Person absolutely entitled—Effect of Enactment by reference to former Act—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 1 [*Revised Ed. Statutes, vol. ix., p.* 628]—3 & 4 *Vict. c.* 87, *s.* 49—18 & 19 *Vict. c.* 95, *ss.* 9, 11—*Rules of Supreme Court*, 1883, *Order* LXV., *r.* 1.

The Act 18 & 19 Vict. c. 95, empowered the Commissioners of Works and Public Buildings, whom it incorporated for the purpose, to take land compulsorily for the purpose of building public offices. Sect. 9 provided that certain sections (including sect. 49) of a previous Act (3 & 4 Vict. c. 87), which had empowered the Commissioners to execute other works, should be deemed to be repeated in the later Act, with the alterations necessary to make the same applicable to its purposes. Sect. 11 provided that any

(1) 3 Sm. & Giff. 394.

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purchase-money payable into the bank should be paid to the account of the Accountant-General of the Court of Chancery, and should be applied under the directions of that Court in like manner as moneys were by the earlier Act directed to be applied under the directions of the Court of Exchequer, "with such power to the Court of Chancery with regard to costs" as by the earlier Act were vested in the Court of Exchequer. Sect. 49 of the earlier Act provided that, when purchase-money was required to be paid into the bank in the name of the Accountant-General of the Court of Exchequer, and to be reinvested in land, it should be lawful for the Court to order the expenses of all purchases from time to time to be made under the Act to be paid by the Commissioners. This Act contained no other provision as to costs:—

Held, that the effect of these enactments was to introduce the incorporated sections of the earlier Act into the later Act, just as if they had been enacted in it for the first time, and that, consequently, the later Act, with those sections in it, must be treated as having been passed after the *Lands Clauses Consolidation Act*, 1845:—

Held, therefore, that the provisions of sect. 80 of the *Lands Clauses Act* were, by virtue of sect. 1 of that Act, incorporated with the Act of 18 & 19 Vict. c. 95, and that the Court had power to order the Commissioners to pay the costs of an application for the payment out of purchase-money to the persons who had become absolutely entitled to the land in respect of which the money had been paid in.

In re Cherry's Settled Estates (1) disapproved.

Held, also, that the Commissioners did not represent the Crown, and that, if they did, the effect of the incorporation of the *Lands Clauses Act* with the Act 18 & 19 Vict. c. 95, was to make the provisions of the *Lands Clauses Act* binding on them.

Whether rule 1 of Order LXV. gives the Court power to order the payment of costs in a case in which there would have been no jurisdiction to do so before the *Judicature Act*, *quære*.

APPEAL by the Commissioners of Her Majesty's Works and Public Buildings from part of an order made by Vice-Chancellor *Bacon* in Chambers.

Under the powers of the *Downing Street Public Offices Extension Act*, 1855 (18 & 19 Vict. c. 95), the Commissioners had taken for the purposes of the Act certain land which formed part of the estate of *Joseph Wood*, deceased, and the purchase-money was paid into Court to the credit of an account entitled "*Ex parte* the Commissioners of Her Majesty's Works and Public Buildings. The estate of *Joseph Wood* deceased." Upon the application, by summons under Order LV. of the Rules of the Supreme Court, 1883, of some of the persons entitled under the will of *Joseph*

(1) 4 D. F. & J. 332.

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Wood, Vice-Chancellor *Bacon*, on the 23rd of June, 1885, ordered the payment out of Court of part of the fund to the persons who had become absolutely entitled thereto, and ordered that the Commissioners should pay to the applicants their costs (including therein all reasonable charges and expenses incident thereto) of obtaining the order and of all proceedings relating thereto, except such costs (if any) as were occasioned by litigation between adverse claimants, such costs to be taxed.

The Commissioners appealed from the direction as to the payment of costs.

The Act 18 & 19 Vict. c. 95, by sect. 1, incorporated for the purposes of the Act, under the name of "Commissioners of Her Majesty's Works and Public Buildings," the persons who for the time being, under the provisions of the Act 14 & 15 Vict. c. 42, should be Commissioners of Her Majesty's Works and Public Buildings.

Sect. 6 empowered the Commissioners, "out of any moneys which may be appropriated by Parliament, and put at their disposal for that purpose," to purchase certain hereditaments in the parish of *St. Margaret, Westminster*, mentioned and described in the 3rd Schedule to the Act, for the purposes of the Act.

Sect. 9 provided that, for the purposes of the Act, the following sections of the Act 3 & 4 Vict. c. 87—namely, sects. 11 to 26, both inclusive; sects. 28 to 57, both inclusive; and sects. 66 to 75, both inclusive, "shall be deemed to be herein repeated, with the alterations necessary to make the same applicable to the purposes of this Act, and to the Commissioners hereby incorporated, instead of the Commissioners by that Act incorporated, and so as to enable the Commissioners hereby incorporated to carry into effect the purposes of this Act."

And sect. 11 provided that, "with respect to any purchase-moneys payable into the Bank of *England* under the provisions of this Act, the same shall be paid to the account of the Accountant-General of the Court of Chancery, pursuant to the method prescribed by" the Act 12 Geo. 1, c. 32, "and pursuant to the General Rules and Orders of the said Court, and without fee or reward," according to the Act 12 Geo. 2, c. 24, "in like manner as moneys are by the said Act (3 & 4 Vict. c. 87) directed to be

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paid to the account of the Accountant-General of the Court of Exchequer; and such moneys shall be applied under the direction of the Court of Chancery in like manner as moneys are by the said Act directed to be applied under the direction of the Court of Exchequer, with such powers to the Court of Chancery with regard to costs as by the said Act (3 & 4 Vict. c. 87) were vested in the Court of Exchequer."

The Act 3 & 4 Vict. c. 87, constituted the Commissioners of Her Majesty's Woods, Forests, &c., a corporation for the purposes of that Act, and empowered them to purchase land and houses for the purpose of making certain improvements in the metropolis. Sect. 44 provided for the payment into the Bank of *England*, in the name of the Accountant-General of the Court of Exchequer, of purchase-money, amounting to or exceeding £200, of hereditaments belonging to persons under disability, and for the application of the money, under the direction of the Court by an order made upon petition, in the purchase or redemption of land tax, or in the discharge of incumbrances affecting the hereditaments sold; or, where not so applied, that the money should be laid out and invested under the direction of the Court in the purchase of other hereditaments to be settled to the same uses as the hereditaments sold. There was no provision for the payment out of the purchase-money to persons absolutely entitled to the hereditaments.

Sect. 49 provided that where by reason of any disability or incapacity of the person or persons entitled to any hereditaments to be purchased or taken under the authority of the Act, the purchase-money for the same should be required to be paid into the Bank in the name of the Accountant-General of the Court of Exchequer, and to be applied in the purchase of other hereditaments, to be settled to the like uses, "it shall be lawful for the said Court to order the expenses of all purchases from time to time to be made in pursuance of this Act, or so much of such expenses as the said Court shall deem reasonable, to be paid by the said Commissioners, who shall from time to time pay such sum or sums of money out of the moneys applicable to the purposes of this Act, as the said Court shall direct."

This Act contained no other provision as to costs.

The *Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 18), provides by sect. 1 that "that this Act shall apply to every undertaking authorized by any Act which shall hereafter be passed, and which shall authorize the purchase or taking of lands for such undertaking, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed together therewith, as forming one Act."

C. Russell, A.G., and *Vaughan Hawkins*, for the Appellants:—

The Vice-Chancellor had no jurisdiction to order the payment of costs by the Commissioners. He thought that the case was concluded by *Ex parte Mercers' Company* (1). That decision, however, is in conflict with the weight of authority. Before the *Judicature Acts* it was settled that such an order could not be made: *In re Cherry's Settled Estates* (2). That was a decision of Lord Chancellor *Westbury*, sitting on appeal, upon the Act 3 & 4 Vict. c. 87, as incorporated with the Act 9 & 10 Vict. c. 34, and it is binding on this Court. The provisions of the *Judicature Acts* and of Order LXV., rule 1, as to costs apply only to cases where the Court had previously jurisdiction to order the payment of costs, and do not give jurisdiction to order the payment of costs in cases in which the Court had no jurisdiction before the Acts to do so: *Foster* v. *Great Western Railway Company* (3); *Dicks* v. *Yates* (4); *In re Knight's Will* (5); *Garnett* v. *Bradley* (6); *In re Bradford* (7). At any rate, neither those Acts nor the *Lands Clauses Act* bind the Crown, and the Commissioners represent the Crown and stand in the same position: *Yates* v. *The Queen* (8); *Reg.* v. *McCann* (9).

(1) 10 Ch. D. 481.
(2) 4 D. F. & J. 332.
(3) 8 Q. B. D. 25, 515.
(4) 18 Ch. D. 76.
(5) 26 Ch. D. 82.
(6) 3 App. Cas. 944.
(7) 15 Q. B. D. 635.
(8) 14 Q. B. D. 648.
(9) Law Rep. 3 Q. B. 677.

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[LOPES, L.J., referred to *Parsons* v. *Tinling* (1), and *Ex parte Hospital of St Katharine* (2).

LORD ESHER, M.R., referred to *Harris* v. *Petherick* (3).]

The Commissioners are not proper parties to this proceeding, but are mere strangers. A company or public body, who have paid money into Court for the purchase of land which they have taken under statutory powers, ought not to be served with notice of an application to pay it out to the persons entitled to it, unless the statute gives the Court jurisdiction to order them to pay the costs of the application. There is no such jurisdiction in the present case.

Warlters Horne, for the Respondents:—

This order is in accordance with the old practice of the Court of Exchequer in Equity, which was adopted by the Court of Chancery in some cases transferred to it from the Court of Exchequer on the abolition of the Equity jurisdiction of that Court, though the decisions are contradictory: *In re Robertson* (4); *In re Harrison's Estate* (5); *In re Great Western Railway Company* (6); *Ex parte Northwick* (7).

[LORD ESHER, M.R., referred to *In re Mouseley's Trust* (8); *Re Metford's Trust* (9); *In re Westminster Estate of the Parish of St Sepulchre* (10). The question whether the provisions of the *Lands Clauses Act* as to costs do not apply, though not expressly incorporated by the Act of 1855, requires consideration.]

The practice of the Registrars of the Chancery Division is to refuse to draw up an order of this kind for the payment of money out of Court, unless the company or public body are served.

[LINDLEY, L.J.:—It is always done under the *Lands Clauses Act*. But, in other cases, if the money has been paid in to the separate account of a person named, I doubt whether it is necessary to serve the company. In the present case I am disposed to

(1) 2 C. P. D. 119.
(2) 17 Ch. D. 378.
(3) 4 Q. B. D. 611.
(4) 23 Beav. 433.
(5) Law Rep. 10 Eq. 532.
(6) 1 Ph. 560.
(7) 1 Y. & C. Ex. 166.
(8) 4 K. & J. 86, n.
(9) 8 W. R. 634.
(10) 4 D. J. & S. 232.

think that the Commissioners ought to be served, because the fund stands to the account of the estate of a deceased person.]

A fortiori the Commissioners ought to be served when, as in the present case, the Act makes no provision, as sect. 69 of the *Lands Clauses Act* does, for paying out the money to the persons becoming absolutely entitled to it. There has been a devolution of title since the money was paid in by the Commissioners. Even under the *Lands Clauses Act* the company who had paid in the money would be the proper persons to contest the title of the person who was applying to have it paid out, and the Court would not order the money to be paid out if the company contested the Petitioner's title: *In re Hobson's Trusts* (1); *In re Ward's Estates* (2); *In re Gooch's Estate* (3). And, in a case like the present, where the Act gives no power to order the payment out of the money, the Commissioners must be here to enable the Court to exercise jurisdiction.

But, even if the Court had no jurisdiction before the *Judicature Act* to order the Commissioners to pay these costs, the words of rule 1 of Order LXV. are sufficient to give jurisdiction now: "The costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the Court or Judge." This is "a proceeding" in the Court, and these costs are incident to it. The effect of the rule ought not to be narrowed: *Butcher* v. *Pooler* (4). *Foster* v. *Great Western Railway Company* (5) was an extreme case (6). It is consistent with justice that a public body who take land compulsorily should pay the costs of an application for the payment of the purchase-money to the persons entitled. They would have to pay the costs of a reinvestment in land, which would amount to more than the costs of such an application as the present. *Ex parte Mercers' Company* (7) has been followed, and it is now settled that the Court has jurisdiction to give costs in such cases: *In re Lee and Hemingway* (8).

But in the present case the *Lands Clauses Act* applies. The provisions of the Act of 1840, which are incorporated into the

(1) 7 Ch. D. 708.
(2) 28 Ch. D. 100.
(3) 3 Ch. D. 742.
(4) 24 Ch. D. 273.
(5) 8 Q. B. D. 515.
(6) *Per Brett*, M.R., 24 Ch. D. 278.
(7) 10 Ch. D. 481.
(8) 24 Ch. D. 669.

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Act of 1855, must be taken for this purpose as passed in 1855, and the Act of 1855, with those clauses in it, must be treated as passed after the *Lands Clauses Act*. Therefore, by virtue of sect. 1 of the *Lands Clauses Act*, the provisions of sect. 80 of that Act as to the payment of costs are incorporated with the Act of 1855, there being nothing in that Act, or in the Act of 1840, expressly or impliedly varying or excepting those provisions. This view is in accordance with the decision of Lord *Westbury* in *In re Westminster Estate of the Parish of St. Sepulchre* (1), in which he distinguished *In re Cherry's Settled Estates* (2). This view is also confirmed by *In re Ellison's Estate* (3).

Vaughan Hawkins, in reply:—

The *Lands Clauses Act* is incorporated with subsequent Acts only so far as its provisions are applicable to the particular undertaking. There is sufficient in the Act of 1855 to exclude the provisions of the *Lands Clauses Act*—quite as much as there was in *In re Cherry's Settled Estates*. Sect. 11 shews the intention of the Legislature: they did not intend to make any further provision for the payment of costs by the Commissioners than those which are made by sect. 49 of the Act of 1840. Nothing was contemplated but reinvestment of the money in land; if for their own convenience the persons entitled choose to take the money out, there is no reason why the Commissioners should pay their costs. In the *St. Sepulchre's Case* all the special Acts had been passed after the *Lands Clauses Act*. The Commissioners really represent the Crown, and the Crown is not bound by the *Lands Clauses Act*. The Commissioners are merely servants of the Crown, and they are specially incorporated by the Act of 1855 for the purposes of that Act: *Reg.* v. *McCann* (4).

LORD ESHER, M.R. (after stating the facts, continued):—

The Commissioners took the land, and were obliged to pay for it, under and by virtue of the Act 18 & 19 Vict. c. 95, which was passed in 1855, and, therefore, after the passing of the *Lands Clauses Act*. The first question, therefore, is whether any part of

(1) 4 D. J. & S. 232.
(2) 4 D. F. & J. 332.
(3) 8 D. M. & G. 62.
(4) Law Rep. 3 Q. B. 677.

the *Lands Clauses Act*, though it is not expressly mentioned in the Act of 1855, is to be considered as incorporated into that Act, and, if so, whether the whole of it is incorporated?

Now the effect of sect. 1 of the *Lands Clauses Act* obviously is (putting aside for the moment the question whether the Commissioners represent the Crown) that that Act is to be considered as incorporated with every subsequent Act which authorizes with respect to any undertaking the purchase or taking of lands, and every part of the *Lands Clauses Act* is incorporated, save so far as its provisions are expressly varied or excepted by the subsequent Act.

It follows that the *Lands Clauses Act* (unless there be something expressly varying or excepting any particular provision of it) is incorporated into this Act of 1855, subject to the question with regard to the Crown.

It is said that there are some provisions in the Act of 1855, or in the earlier Act of 1840, which have the effect of expressly varying or excepting the provisions of the *Lands Clauses Act* as to the costs of paying money out of Court. It is not denied that the *Lands Clauses Act* itself would give the Court jurisdiction to deal as the Vice-Chancellor has done with the costs of the payment out of this money. It is not alleged that there is anything expressly varying or excepting that provision of the *Lands Clauses Act* in the ordinary sense of the words, but it is said that it is done by a necessary implication.

The material sections of the Act of 1855 are the 9th and the 11th. By the 9th section certain sections of the Act of 1840 are incorporated into the Act of 1855. That Act of 1840 was passed before the *Lands Clauses Act*. Now what is the legal effect of the 9th section of the Act of 1855, which brings into that Act those sections of the former Act? It is to put them into the Act of 1855, just as if they had been written into it for the first time. If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all. For all practical

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purposes, therefore, those sections of the Act of 1840 are to be dealt with as if they were actually in the Act of 1855. They are to be treated as legally in an Act which was passed after the passing of the *Lands Clauses Act*. The mere fact of bringing clauses from an anterior Act into a subsequent Act cannot on any legal principle prevent the subsequent Act from being treated as entirely a subsequent Act, and cannot, therefore, prevent the application of the *Lands Clauses Act* to that subsequent Act.

But it is said that sect. 11 of the Act of 1855 does expressly vary or except the provisions of the *Lands Clauses Act* with respect to such costs as these, because it deals exhaustively with the question of the expenses of the application of the moneys which are to be paid into the Bank to the credit of the person whose land is taken. Sect. 11, again, brings into the Act by reference some provisions of the Act of 1840. It provides that moneys paid into the Court of Chancery shall be applied under the direction of that Court in like manner as moneys paid into the Court of Exchequer under the Act of 1840 are to be applied under the direction of that Court, "with such powers to the Court of Chancery with regard to costs as by the Act of 1840 were vested in the Court of Exchequer." But, when we turn to the Act of 1840, it is clear that the reference in sect. 11 can only be to sect. 49 of that Act. But sect. 49 contains no provision for the costs of the payment out of money; it deals only with "the expenses of purchases." It says that the Court may order "the expenses of all purchases" to be paid by the Commissioners. There is nothing there about "costs," and yet sect. 11 of the Act of 1855 gives to the Court of Chancery "such powers with regard to costs as by the Act of 1840 were vested in the Court of Exchequer." It is plain that inadvertently the Legislature have used the word "costs" in a particular sense, *i.e.*, as meaning the expenses of purchases. The Act does not, therefore, deal with the costs of the payment out of money, which are not expenses of the purchase of other land for reinvestment, but arise when there is no purchase of other land. Therefore the question of the costs of payment out is not dealt with in the 11th section of the Act of 1855, either in itself or when you bring into it by reference the 49th section of the Act of 1840. The costs of the payment of

money out of Court to a person absolutely entitled to it, when the money has been paid in, not to the account of the particular person by name to whom the land actually belonged, but to the account of his estate, so that there must be an inquiry who is entitled to the money, are not dealt with expressly or by implication in the special Act.

How, then, are these costs to be dealt with? They are to be dealt with according to the provisions of the *Lands Clauses Act*, which are imported into the Act of 1855, and the *Lands Clauses Act* clearly gives the Court power to deal with these costs. If that be so, the Court would have had jurisdiction to order these costs to be paid by the Commissioners, even before the *Judicature Act* was passed, and the *Judicature Act* has not taken away that jurisdiction. It is said, however, that there is authority which prevents us from treating the Act of 1855 as wholly passed after the *Lands Clauses Act*, and that authority is the decision of Lord Chancellor *Westbury* in *In re Cherry's Settled Estates* (1). Of course, we should act in accordance with the previous decisions of a Court of co-ordinate jurisdiction, whether we ourselves should or should not have come to the same conclusion in the first instance. But the authority of a case when cited does not depend on its facts; it depends on the principle upon which the Judge acted. And Lord *Westbury* himself, in the subsequent case of *St. Sepulchre*, sitting in the same Court in which he sat when he decided *In re Cherry's Settled Estates*, explained the grounds of his judgment in that case. He said (2): "The language of the Act 9 & 10 Vict. c. 34, which was in question in *In re Cherry's Settled Estates*, was such as to render transactions under it as though they had been transactions under the antecedent Act of 3 & 4 Vict., and to pass over the *Lands Clauses Act* altogether; and it followed that the provisions of that general Act could not affect such transactions." That is, he read the new Act into the old Act, instead of reading the old Act into the new Act. That was the ground of his decision. His decision, therefore, in *In re Cherry's Settled Estates* does not touch the present case, in which, as I think, upon a true construction of the two Acts, the old Act is to be read into the new Act. But I will say candidly that that explanation of *In re*

(1) 4 D. F. & J. 332. (2) 4 D. J. & S. 243.

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Cherry's Settled Estates (1) is far too refined for my comprehension. I think that if we had to decide that case now we should decide it directly contrary to the way in which Lord *Westbury* decided it, and when I read his judgment in the *St. Sepulchre's Case* (2), I cannot help thinking that, if he had then had to decide *In re Cherry's Settled Estates* again, he would have decided it in exactly the contrary way. Whenever *In re Cherry's Settled Estates* is cited hereafter it will be explained away. I think, therefore, the best thing is to drop it altogether. It will be a binding authority on this Court, and on any inferior Court, whenever a Judge can bring his mind to the conclusion that, on the true construction of an Act subsequent to the *Lands Clauses Act*, which brings into itself by reference certain provisions of an Act passed before the *Lands Clauses Act*, the subsequent Act is to be read into the former one, instead of the former one into the subsequent one. I doubt whether any Judge will ever come to that conclusion again. If not, there never will be another case for which *In re Cherry's Settled Estates* will be an authority.

In the *St. Sepulchre's Case* all the special Acts were subsequent to the *Lands Clauses Act*. It is an authority, therefore, for that for which authority was hardly needed, that the effect of the 1st section of the *Lands Clauses Act* is to incorporate that Act into every subsequent Act of the kind mentioned in sect. 1, without any express incorporation by the special Act.

There having, then, been authority in the Court of Chancery before the *Judicature Act* to make this order as to costs, by reason of the *Lands Clauses Act* being incorporated with the Act of 1855, it is obvious that rule 1 of Order LXV. applies. No one can doubt that, wherever costs were within the jurisdiction, either of a Common Law Court or of the Court of Chancery, before the *Judicature Act*, those costs are now within rule 1 of Order LXV., and are in the discretion of the Court, subject to the exceptions in that rule mentioned.

It is unnecessary, therefore, to decide the point which has been raised, whether, in a case in which before the *Judicature Act* there was no jurisdiction, either in the Common Law Courts or in the Court of Chancery, to give costs, Order LXV. has given to the

(1) 4 D. F. & J. 332. (2) 4 D. J. & S. 232.

Supreme Court a jurisdiction as to costs which did not exist in any of the Courts before. It is not necessary to decide that point now, and I decline to express any opinion about it.

The only other question is whether, assuming that the *Lands Clauses Act* would have been read into the Act of 1855 in any ordinary case, this can be done in the case of these Commissioners who, it is said, represent the Crown, and are in fact the Crown, the Crown not being mentioned in the *Lands Clauses Act*. The *Lands Clauses Act* is brought into the Act of 1855 by reference, and the legal effect of its incorporation is this, that, the moment the later Act is passed, it must be considered that the Legislature have written into it the provisions of the *Lands Clauses Act*, and, if that be so, the Act of 1855, in dealing with these Commissioners, if they are to be taken to be the Crown, is dealing with the Crown itself. Therefore, the objection that the Crown is not mentioned in the *Lands Clauses Act* falls to the ground.

I think that the judgment appealed against is right, and that the appeal must be dismissed.

LINDLEY, L.J.:—

The Appellants contend that the Vice-Chancellor had no jurisdiction to order them to pay any part of the costs which he has ordered them to pay. The point which was primarily intended to be raised by the appeal, viz., whether the view taken by *Jessel*, M.R., in *Ex parte Mercers' Company* (1) was correct, is one which, as it appears to me, it is unnecessary for us to determine; and I will say no more about it than that, when it does arise, more attention must be paid to sect. 24 of the *Judicature Act* of 1875 than appears to have been given to it already.

The argument for the Appellants, apart from that matter, is based upon the provisions of the special Acts which relate to the taking of the land which has been taken here. The land has been taken under the provisions of the Act of 1855, which expressly incorporates the Commissioners for the purposes of that Act, and empowers them to take certain lands for public purposes. There is nothing of a private nature in the Act or its objects; it is a public undertaking, for public purposes, autho-

(1) 10 Ch. D. 481.

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rized by a public Act passed since the *Lands Clauses Act*. The terms of sect. 1 of the *Lands Clauses Act* are so extensive and so express, that it appears to me impossible to say that the provisions of that Act do not apply to this undertaking, so far of course as the provisions of the special Act are not inconsistent with them.

Sect. 9 of the Act of 1855 brings in by reference a portion (not the whole) of a former Act of 1840. But, when we come to put these two statutes together and read the material clauses, we find that the provisions as to costs do not by any means exhaust all the various cases which may arise in practice, and in particular they do not touch, either expressly or by implication, the particular point which we have now to decide, that is, how the costs of an application for payment out of Court of money paid in for the purchase of land shall be dealt with where the application is made by a person absolutely entitled to the money; there is a complete silence upon the point. But there is in the *Lands Clauses Act* an express provision for it, and there is nothing inconsistent between the provisions of the special Acts and the provisions of the *Lands Clauses Act* upon this point. It is not the case of two inconsistent provisions; there is no provision at all in the special Act, and there is an express provision in the *Lands Clauses Act* applicable to this particular case.

Mr. *Vaughan Hawkins* has naturally pressed upon us the decision of Lord Chancellor *Westbury* in *In re Cherry's Settled Estates* (1), which he says is inconsistent with our view as to the application of the *Lands Clauses Act*. It is true that Lord *Westbury* in that case was dealing with the same earlier Act of 1840 which we have to deal with, but he was dealing with a totally different later Act, the Act 9 & 10 Vict. c. 34, the special wording of which induced him to say that the true method of dealing with the two Acts was to carry the later Act back into the earlier Act. That may have been right or wrong upon the special wording of the later Act with which he had to deal; but the Act of 1855 contains no clause similar to that which pressed upon Lord *Westbury* in *In re Cherry's Settled Estates;* and although in that case he came to the conclusion that the *Lands Clauses Act* was not incorporated

(1) 4 D. F. & J. 332.

into the Act 9 & 10 Vict. c. 34, there is, in my opinion, nothing in his judgment which forces us to say that the *Lands Clauses Act* is not incorporated into the Act of 1855, the wording of which is totally different. Whatever may be said about *In re Cherry's Settled Estates* (1) in other respects, it does not, I think, bind us at all in the present case; and apart from that case, I cannot, without doing violence to sect. 1 of the *Lands Clauses Act*, hold that that Act does not apply to the costs of this particular application, which are not provided for by the special Act.

For the reasons I have stated I am of opinion that there was ample jurisdiction for the Vice-Chancellor to make this order. It was the proper order to make, and the appeal must be dismissed unless there is anything in the point which has been taken about the Crown.

But although the Crown is not bound by the *Lands Clauses Act*, and cannot be ordered to pay costs, no authority has been cited to shew that this particular corporation, incorporated by the Act of 1855 for certain public purposes, is to be treated as the Crown, and there is no ground for holding that a corporation specially incorporated in this way is in the same position as regards costs as the Crown. The corporation will be provided by Parliament with funds for whatever purpose is within the scope of their powers and obligations, including those which arise under the *Lands Clauses Act*. They will have to pay the costs of reinvestment in land out of these funds, and out of these funds they will have to pay the costs of the present application.

I am glad to be able to arrive at this conclusion. It would be ludicrous if this public body were liable to pay the costs of an expensive proceeding to get the money out of Court and invest it in land, and were exonerated from paying the much smaller costs of paying the money out to the persons absolutely entitled to it.

LOPES, L.J.:—

If the jurisdiction to give costs existed in any Common Law Court or in the Court of Chancery at the time of the passing of the *Judicature Act*, beyond all question that jurisdiction remains under Order LXV., rule 1.

(1) 4 D. F. & J. 332.

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Such a jurisdiction did exist in the present case in a Common Law Court or in the Court of Chancery at the time of the passing of the *Judicature Act*, if the provisions of the *Lands Clauses Act* relating to the costs were incorporated with the special Act which we have to consider.

The special Act of 1855 was passed after the *Lands Clauses Act*, and it incorporates a large portion of the earlier special Act of 1840. That being so, it appears to me perfectly clear that the *Lands Clauses Act* became incorporated with the special Act, unless it was expressly excluded, or was inapplicable, or was inconsistent with any of the provisions of the special Act.

It has been said that the provisions of the *Lands Clauses Act* relating to costs are in conflict with sect. 49 of the Act of 1840, and with sect. 11 of the Act of 1855. In my opinion there is no conflict, because neither of those sections had any reference to the costs of paying money out of Court. They are absolutely silent upon that matter. No doubt in sect. 49 of the earlier Act the words "expenses of purchases" are used and the word "costs" is used in sect. 11 of the later Act. But I think it is impossible to read those two sections without coming to the conclusion that in point of fact those words are used as synonymous, that they both apply to the same thing, and that neither of them applies to the costs of paying money out of Court. Therefore I think the *Lands Clauses Act* was incorporated with the special Act, and the *Lands Clauses Act* gave the Court power to deal with the costs in question.

But then it was argued that, even if the *Lands Clauses Act* is incorporated with the special Act, the *Lands Clauses Act* does not bind the Crown. I think the answer to that is simple. The special Act clearly binds the Crown, and directly the *Lands Clauses Act* became incorporated with it, it became an integral part of the special Act, and bound the Crown just as the special Act itself did, in the same way as if the provisions in the *Lands Clauses Act* had been in terms re-enacted in the special Act.

Upon the very important question whether in a case where there was no jurisdiction to give costs, either in a Common Law Court or in the Court of Chancery, at the time of the passing of the *Judicature Act*, rule 1 of Order LXV. is so comprehensive as to

give the Court a discretion to deal with the costs I desire to reserve my opinion until it is necessary to decide it.

I quite agree with Lord Justice *Lindley*, that the conclusion to which we have come entirely meets the justice of the case.

The appeal will be dismissed with costs.

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The order was varied by directing the Commissioners (in accordance with the terms of sect. 6 of the Act of 1855) to pay the costs of the application "out of any moneys that may be appropriated by Parliament and put at their disposal for the purpose."

Solicitors for Commissioners: *Hare & Co.*
Solicitors for Respondents: *Pollock & Co.*

W. L. C.

In re LEWIS. LEWIS *v.* WILLIAMS.

[1874 L. 132.]

C. A. 1885 CHITTY, J. *Oct.* 30. C. A. 1886 *Feb.* 19, 20.

Practice—Time—Motion in Court to vary Order made by Judge of Chancery Division in Chambers—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 50 [*Revised Ed. Statutes, vol. xvii., p.* 86]—*Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 15.

In an administration action by next of kin against administratrix, the conduct of which had been given to a creditor, an order was made, on the application of the administratrix, by the Judge personally in Chambers, directing the taxation of the costs of the Plaintiff, the Defendant, and the creditor, and the application of the funds in Court in payment of a debt and then *pro tanto* of the costs when taxed, priority being given to the costs of the Defendant. Liberty was also given to any of the parties to apply in Chambers as to the getting in of an outstanding asset, and generally:—

Held, that this was an interlocutory order, and that a notice of motion in Court to vary it, given after the expiration of twenty-one days, was too late.

APPEAL from the refusal of Mr. Justice *Chitty* to vary an order which he had himself previously made in Chambers.

The action was commenced by summons in 1874, to administer the estate of *William Lewis*, who had died intestate.

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The Plaintiff was his infant daughter, by a next friend.

The Defendant was the administratrix of the intestate.

On the 6th of November, 1874, an administration order was made in Chambers. During the progress of the suit the widow married *H. Williams*, who was then added as a Defendant. He afterwards died.

By an order of the 3rd of April, 1879, the conduct of the action was given to *David Jones* and *Charlotte* his wife, she being the administratrix of *Deborah Jones*, who had been admitted as a creditor on the estate of the intestate.

By the Chief Clerk's certificate of the 20th of January, 1881, a balance of £316 5*s.* 3*d.* was found to be due from the Defendant *Ann Williams* to the estate of the intestate. The sum of £151 1*s.* 8*d.* was paid by her, and the balance remained still unpaid.

By an order of the 17th of May, 1881, made upon the application of the Defendants, it was ordered that the costs of Mr. and Mrs. *Jones* (including any costs properly incurred after the 11th of May, 1878), should be taxed, and added to the amount of their debt and interest allowed by the certificate. And it was ordered that certain sums in Court to the credit of the cause should be transferred and paid to Mr. and Mrs. *Jones* in discharge of their debt, interest, further interest, and costs, so far as the same would extend. And it was ordered that the Defendants *Williams* and his wife should, within one week from the filing of the Taxing Master's certificate, pay the balance of such debt, interest, further interest, and costs to Mr. and Mrs. *Jones*.

By an order of the 17th of July, 1885, made by Mr. Justice *Chitty* personally in Chambers, upon the application of the Defendants (Mr. and Mrs. *Jones* being represented by their solicitors), it was ordered that it be referred to the Taxing Master to tax the costs of the Plaintiff and the Defendants, and the costs from the 18th of May, 1881, of Mr. and Mrs. *Jones* of the action; the costs of the Defendants to be taxed as between solicitor and client, and to include any charges and expenses properly incurred by them in relation to the administration of the estate of the testator beyond her costs of the action, and not already taxed and allowed. And it was ordered that the funds in Court should be

dealt with as directed in the schedule thereto,—but, if such funds should be insufficient to pay all the costs directed to be taxed, the residue of the funds, after payment of the Defendants' costs, was to be apportioned between the Plaintiff and Mr. and Mrs. *Jones* in respect of their costs, and the apportioned amounts were to be certified by the Taxing Master. Liberty was given to any of the parties to apply in Chambers as to getting in an outstanding sum of £400, referred to in the Chief Clerk's certificate, and as to a debt due to *Mary Jones*, also referred to in the certificate, and generally as they might be advised.

The schedule to this order provided for the payment of the debt due to Mr. and Mrs. *Jones* out of the funds in Court.

On the 2nd of September, 1885, Mr. and Mrs. *Jones* served a notice of motion to vary the order of the 17th of July, by directing that their costs and the costs of the Plaintiff should be taxed as between solicitor and client and paid out of the estate, and that the Defendant Mrs. *Williams* might be ordered to retain her costs, and those of her late husband, when taxed, out of the balance by the certificate found due from her, and to pay the residue of that balance into Court within four weeks after the date of the Taxing Master's certificate.

The motion was heard before Mr. Justice *Chitty* on the 30th of October, 1885.

Upjohn, for the motion.

Maclean, for Mrs. *Williams*:—

This motion is in the nature of an appeal from an interlocutory order, and as the twenty-one days from the time when the order was pronounced expired on the 6th of August, and notice of this motion was not served until the 2nd of September, the Court will adopt by analogy the course pointed out by Order LVIII., rule 15, and hold that this appeal is out of time and cannot be brought except by special leave: *Heatley* v. *Newton* (1); *Dickson* v. *Harrison* (2).

Upjohn:—

Order LVIII., rule 15, applies only to appeals to the Court of

(1) 19 Ch. D. 326. (2) 9 Ch. D. 243.

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Appeal, and clearly has nothing to do with this case. The order appealed from was founded on the Chief Clerk's certificate, dealt with the costs and funds in Court, and settled the rights of the parties, and was in the nature of an order on further consideration, which has been held to be a final order: *Cummins* v. *Herron* (1). If not an order on further consideration it is, at any rate, a final order, inasmuch as it determines the rights of the parties: *In re Stockton Iron Furnace Company* (2), and is conclusive against the Plaintiff: *Standard Discount Company* v. *La Grange* (3); Ann. Prac. (4); *In re National Funds Assurance Company* (5). Nor can it be said that the case falls within the alternative mentioned in Order LVIII., rule 15, "or from any order, whether final or interlocutory, in any matter not being an action," as a proceeding for administration commenced by originating summons is an action within the above rule: *In re Fawsitt* (6).

Maclean, in reply:—

If this motion be right in point of time an appellant from an order made in Chambers will have a year within which to appeal to the Judge in Court, and another year for appealing to the Court of Appeal. An order to vary a Chief Clerk's certificate is an interlocutory order, though included in an order on further consideration which is final, and so is an order on a creditor's claim in an administration suit, though final as to the creditor, and final as to the estate: *Wilson's* Jud. Acts (7), and cases there cited. In this case the order of May, 1881, was a final judgment on the claim of Mr. and Mrs. *Jones*, and, so far as they were concerned, they had nothing more to do with the proceedings.

CHITTY, J.:—

This is a motion to vary an order made in Chambers, and the Respondents object that the motion is out of time. If I act on the analogy of the rule (Order LVIII., rule 15) relating to appeals to the Court of Appeal, then I must hold that the appeal not

(1) 4 Ch. D. 787.
(2) 10 Ch. D. 349.
(3) 3 C. P. D. 67, 71.
(4) (1884–5) p. 619.
(5) 4 Ch. D. 305.
(6) 30 Ch. D. 231.
(7) 4th Ed. p. 106.

having been brought within twenty-one days from the date of pronouncing the order cannot be brought except by special leave of the Court. The point I have to decide relates to the character of the order itself. Order LVIII., rule 15, distinguishes between orders interlocutory and orders final, and also between orders, whether interlocutory or final, made in an action and in any matter not being an action. Now the order in question was clearly not made in a matter, but an order made in an action. It has been contended that this was an order made upon further consideration, and, therefore, a final order. In my opinion the order was not made upon further consideration. It was made upon a summons in an action which has never been heard on further consideration, and probably never will be. The action was brought by a beneficiary for administration, and one of the creditors, *Deborah Jones*, obtained conduct of the action. After her death her representatives (Mr. and Mrs. *David Jones*) obtained the conduct of the action. The order of the 17th of May, 1881, in substance ordered the fund in Court to be applied in discharge of the debt due to the creditor, and went on to order Defendant, the legal personal representative, to pay the balance of the debt and costs. It appears to me that the order of May, 1881, was a final order as to creditors, though made on an interlocutory application, and the case falls within *Pheysey* v. *Pheysey* (1), which decides that such an order, though it finally decided the rights of parties, was in reality an interlocutory order, and therefore must be appealed from within twenty-one days. The order was equivalent to a judgment against the executrix *de bonis propriis*, and in the subsequent orders the creditor is treated as having no further interest in the matter. The order under appeal has simply done what I have stated, viz., applied the balance of the fund in Court in payment of costs, and it appears to me that this is an order from which under Order LVIII., rule 15, any application to discharge or vary it must be made within twenty-one days. I do not hesitate to say that it is difficult to define what is a final and what is an interlocutory order, and I shall not attempt to give any definition.

The Court of Appeal has not attempted to give an exhaustive

(1) 12 Ch. D. 305.

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definition, and the Legislature in the *Judicature Act*, 1875, s. 12, has not given such a definition. If Mr. *Upjohn's* contention be correct see the consequences. The Appellant would have two years; one within which to apply to discharge or vary the order, and then another within which to apply to the Court of Appeal. I am of opinion that this order is one of those within Order LVIII., rule 15, from which the appeal ought to be brought within twenty-one days. There are no special circumstances in the case to justify an enlargement of the time, and I decline to give special leave. The motion must be refused with costs.

His Lordship subsequently added that when he stated that the case fell within *Pheysey* v. *Pheysey* (1) he omitted to say that it also fell within what was there said as to the object being to expedite appeals, and to encourage promptness.

F. G. A. W.

C. A.

From this decision Mr. and Mrs. *Jones* appealed. The appeal came on for hearing on the 19th of February, 1886.

Upjohn, for the Appellants:—

The order which the Appellants moved to vary was a final order. Though rule 15 of Order LVIII. does not strictly apply, it has been held that the time for moving in Court to vary an order made by a Judge of the Chancery Division personally in Chambers is to be regulated by analogy to that rule: *Heatley* v. *Newton* (2). Nothing remains to be done in the action, except to get in an outstanding asset which is known to be worthless. The order was in substance an order on further consideration, and such an order is a final order: *Cummins* v. *Herron* (3). It is not the practice of the Court to decide who is entitled to a fund in Court, and to order the fund to be paid out, upon an interlocutory application: *Trowell* v. *Shenton* (4). The order finally disposed of all the funds in Court.

[LOPES, L.J., referred to *Standard Discount Company* v. *La Grange* (5); *In re Stockton Iron Furnace Company* (6).]

(1) 12 Ch. D. 305.
(2) 19 Ch. D. 326.
(3) 4 Ch. D. 787.
(4) 8 Ch. D. 318.
(5) 3 C. P. D. 67.
(6) 10 Ch. D. 349.

An order giving costs to a plaintiff, whom the judge at the trial had deprived of costs, has been held to be a final order: *Marsden* v. *Lancashire and Yorkshire Railway Company* (1). The ordinary foreclosure judgment, which is not final as to foreclosure, because an order absolute is necessary to make the foreclosure final, has been held to be final for the purpose of deciding the time for appealing from it: *Smith* v. *Davies* (2).

Maclean, for the administratrix, was not called upon.

LORD ESHER, M.R.:—

I have looked at the order of the 17th of July, and in my opinion it cannot properly be called a final order. It is an interlocutory order, and consequently the notice of motion to vary it was served too late. The appeal must be dismissed with costs.

LINDLEY, L.J.:—

I agree. The order was not an order on further consideration. It was made on the application of the Defendant, who had not the conduct of the cause. I suppose the Plaintiff did not wish to proceed, and the Defendant wished to obtain her costs.

LOPES, L.J., concurred.

Solicitors for Appellants: *Morgan, Son, & Upjohn*, agents for *David Lloyd, Lampeter.*

Solicitors for Defendant: *Roche & Son*, agents for *Jones, Llandovery.*

(1) 7 Q. B. D. 641. (2) *Ante*, p. 595.

W. L. C.

C. A.
1886
Feb. 24.

UNITED TELEPHONE COMPANY *v.* BASSANO.

[1884 U. 357.]

Appeal—Injunction—Bankruptcy.

Judgment having been given restraining the Defendants from making, selling, or using instruments of a certain construction, as being an infringement of the Plaintiffs' patent, and ordering delivery up of all instruments so constructed, the Defendants appealed, but before the appeal was ready for hearing became bankrupt:—

Held, that the Defendants, though bankrupts, had still such an interest in being relieved from the injunction as entitled them to proceed with the appeal on giving security for costs.

An order was made dismissing the appeal unless within a certain time the bankrupts gave security for costs, or the trustee in bankruptcy made himself a party to the proceedings.

THIS was an action to restrain infringement of a patent. On the 12th of August, 1885, judgment was given by Mr. Justice *North* restraining the Defendants from manufacturing, selling, or disposing of or using any instrument of the construction therein mentioned, or only colourably differing therefrom, or any other instrument constructed according to the patent or only colourably differing therefrom, or being an infringement of the patent. The judgment went on to order delivery up by the Defendants of all instruments constructed as above, and to direct an inquiry as to damages, and order payment of them by the Defendants. The judgment being delivered just before the long vacation, the learned Judge postponed giving his reasons.

On the 23rd of September, 1885, the Defendants served notice of appeal, and set down the appeal on the same day.

On the 4th of December the Defendants were adjudicated bankrupts on their own petition. No trustee was appointed, and *John Smith* was the official receiver.

On the 19th of February, 1886, the Plaintiffs served notice of motion on the solicitor of the Defendants and on the official receiver that the appeal might be dismissed for want of prosecution. It was deposed to that but for the bankruptcy the appeal would have come on some weeks previously.

The reasons of Mr. Justice *North* for his judgment had not yet been given.

Feb. 24. *Aston*, Q.C., and *Micklem*, for the Plaintiffs.

Claud Plumptre, for the Respondents, submitted that the Court would not dismiss the appeal for want of prosecution until the reasons for the judgment had been given, so that materials would exist for determining whether it was advisable to prosecute the appeal.

COTTON, L.J.:—

This case is of a novel description. At the trial of the action, just before the long vacation, judgment was given restraining the infringement of a patent, and ordering delivery up of articles made in infringement of it. The judgment was pronounced, but the learned Judge postponed giving his reasons, and has not yet given them. The Defendants gave notice of appeal, and set down the appeal. After this they became bankrupt. The injunction affected both the persons and the property of the Defendants. The official receiver is interested in the question as affecting the trade property; the bankrupts are still interested, for the injunction restrains them from selling a particular class of machines, and if they broke that injunction they might be sent to prison. The injunction, therefore, interferes with their future power of gaining a livelihood, and they have an interest in being relieved from it. We have ascertained from Mr. Justice *North* that he will be prepared to give his reasons within a short time, and the question is, what is the proper order under these circumstances. The bankrupts alone could not be allowed to proceed with the appeal without giving security for costs. If the bankrupts had no interest in the appeal the proper order would be to dismiss the appeal, unless the official receiver, within a limited time, made himself a party. We think that the right order will be that unless, within fourteen days from Mr. Justice *North* giving his reasons, the bankrupts give security for costs, or the official receiver makes himself a party to the proceedings, the appeal shall, without any further order, be dismissed without

C. A. 1886 UNITED TELEPHONE COMPANY v. BASSANO.

costs. If the bankrupts give security, and the official receiver does not make himself a party, the appeal will proceed as that of the bankrupts alone; if the official receiver makes himself a party, and the bankrupts do not give security, the appeal will proceed as that of the official receiver alone.

BOWEN and FRY, L.JJ., concurred.

MINUTES OF ORDER:—That upon the Defendants giving security in £100 for costs the Defendants be at liberty to prosecute their appeal notwithstanding their bankruptcy.

In default of the Defendants giving such security within fourteen days after Mr. Justice *North* shall have given his reasons for the said judgment, or the official receiver procuring and serving upon the Plaintiffs within the time aforesaid an order giving him leave to carry on and prosecute the appeal, Order that the appeal do stand dismissed without further order, but without costs.

Solicitors for Plaintiffs: *Waterhouse, Winterbotham & Harrison.*
Solicitor for Defendants: *C. H. Robertson.*

H. C. J.

C. A. 1886 *Feb.* 24.

APOLLINARIS COMPANY *v.* WILSON.

[1885 A. 1539.]

Practice—Security for Costs.

The Plaintiff obtained an injunction to restrain the Defendants from parting with goods alleged to bear improperly the Plaintiff's trade-mark. The Defendants, who were shipowners, had no interest in the goods, which had only been put in their hands for transmission. *S.*, a resident in *America*, who claimed to be owner of the goods, served notice of motion that he might be at liberty to reship the goods to a foreign port, and that if necessary he might be added as a defendant to the action:—

Held (affirming the order of *Bacon*, V.C.), that *S.* must give security for the costs of the motion, for that whatever his position as to costs might be if and when he was made a defendant, he must on this motion be treated as a person resident abroad coming forward to enforce a right, and stood in the position of a plaintiff.

THIS action was brought by the *Apollinaris Company*, alleging that the Defendants had in their possession a large quantity of mineral water not of the merchandise of the Plaintiff company, but contained in bottles bearing the registered trade-mark of that

company, and that the Defendants intended to send this water to *New York*. The company asked for an injunction to restrain the Defendants from parting with the possession of any mineral water in bottles bearing labels which were an infringement of the trade-mark of the Plaintiff company. The Defendants were steamship owners at *Hull*, and carried goods from places abroad to other places abroad at through rates. They claimed no title to the goods, which they, as shipowners, had received at *Hamburg*, and their agent at that place had given bills of lading for carriage of the bottles to *New York*. They were now at *Hull* awaiting transshipment to *New York*, and the cases had not been opened. On the 26th of October, 1885, Vice-Chancellor *Bacon* granted an injunction until judgment or further order.

On the 15th of December *Scherer*, a resident in *New York*, who alleged himself to be the owner of the goods, served notice of motion that notwithstanding the injunction he might be at liberty to reship the goods to *Hamburg*, and that the Defendants might be restrained from obstructing him in reshipping the same, he undertaking not to sell or otherwise deal with them within the jurisdiction, and that if necessary he might be added as a defendant to the action.

On the 22nd of December the company took out a summons that *Scherer* might be ordered to give security for the costs of the motion. On the 15th of January, 1886, *Scherer's* motion was ordered to stand over for eight weeks that he might be cross-examined in *America*. On the 23rd of January Vice-Chancellor *Bacon* directed that *Scherer* should find a sufficient person to give security by bond in the penalty of £100 to answer the costs of the motion, and that till such security was given *Scherer* should take no further proceedings on the motion. *Scherer* appealed.

Millar, Q.C., and *W. N. Lawson*, for the appeal:—

We contend that the case is not one where security should be ordered at all, but if the Court should be against us on that, we ask the Court to follow the precedent set by the late Master of the Rolls in *Vavasseur* v. *Krupp* (1), and to order *Scherer* to be made a party, he giving security.

(1) 9 Ch. D. 351.

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APOLLINARIS COMPANY v. WILSON.

[BOWEN, L.J.:—So far as your motion is concerned you are an actor, and why should you not, being out of the jurisdiction, give security for costs?]

We submit that *Scherer* is not an actor, the Plaintiffs have commenced litigation which affects his property, and he is obliged to defend it. *Watteeu* v. *Billam* (1) decides that where a person resident abroad is, by the act of another person, compelled to litigate here, he will not be ordered to give security for costs. That was a case of a bill to restrain an action at law.

[FRY, L.J.:—Here there is no litigation against you.]

We are substantially Defendants.

Marten, Q.C., and *J. Cutler*, *contrà*, were not called upon.

COTTON, L.J.:—

The only question we have to deal with here is, whether the Appellant ought to give security for costs of a motion which he has made to be admitted as a party to the action that he may claim the property in dispute as his. We cannot assume that on the hearing of that motion any of the facts that are alleged will ultimately be proved, and the Appellant is coming forward as an actor, just as if he were in the position of a plaintiff seeking to enforce as against the other parties to the action the right which he claims. It will be entirely a different question what ought to be done with his costs if and when he is made a party. All we have to deal with now is, whether security has been properly ordered to be given for the costs of this motion, which is not a motion made against him but by him. In my opinion, as he is out of the jurisdiction, the Judge was right in ordering him to give security for those costs. What ought to be done as to his costs as a defendant if he is added as a defendant, or as to the costs of any counter-claim which he may set up, are questions which may be decided if and when they arise.

BOWEN, L.J.:—

I am of the same opinion.

(1) 3 De G. & Sm. 516.

FRY, L.J.:—

I am of the same opinion.

Solicitor for *Scherer: John W. Sykes.*
Solicitors for Plaintiffs: *Janson, Cobb, Pearson, & Co.*
Solicitors for Defendants: *Pritchard & Sons.*

H. C. J.

DE CAUX *v.* SKIPPER.
TEE *v.* DE CAUX.

[1883 D. 2558.]

Practice—Mortgage of Two Estates by same Mortgagor—Foreclosure—Consolidation—Separate Redemptions—Costs of Action.

When a mortgagee brings an action to foreclose two mortgages of two distinct estates, but which mortgages are by force of the statute or otherwise not liable to be consolidated, the costs of the action are not to be charged against each estate, but must be apportioned rateably between the two estates.

Clapham v. *Andrews* (1) overruled.

THE Defendant *William Skipper* had by one and the same deed, dated the 30th of October, 1876, mortgaged two properties to the Plaintiff, one of twenty-six acres (which he held as trustee) to secure £320, and the other of six acres (which he had purchased to hold with the trust estate but without power to do so), to secure £380. The deed contained separate provisoes of redemption and dealt with each of the properties as a distinct property. Vice-Chancellor *Bacon*, on the hearing before him, held that the Plaintiff was entitled to consolidate, and gave one judgment for foreclosure of both properties and one period of redemption.

The Defendant appealed from the decree so far as it directed consolidation.

Hemming, Q.C. (*Beddall* and *C. Tennant* with him), for the appeal, was stopped by the Court.

(1) 27 Ch. D. 679.

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De Caux v. Skipper.
Tee v. De Caux.

Marten, Q.C., and *Vernon R. Smith*, for the Plaintiff:—

Assuming that the Plaintiff is not entitled to consolidate his two mortgages, but that the mortgagor may redeem each separately, still the whole of the costs of the action ought to be charged against each estate. The mortgagee is acting properly in bringing his action for foreclosure, and he is entitled to the costs of the action. In *Clapham* v. *Andrews* (1), a case precisely similar to this, where there was no right of consolidation, *Pearson*, J., ordered the whole costs of the action to be so charged.

Hemming, in reply, as to costs.

Cotton, L.J. (after stating the facts and deciding that no right to consolidate arose, and that there must be a separate redemption of the two estates, proceeded):—

Then comes the question as to the costs. It is said on behalf of the Plaintiff that whatever may be the result with regard to the right of the mortgagor to separate redemptions, yet having to redeem he must pay the whole costs of the action. But this is wrong, for this would amount to consolidation so far as the costs are concerned, though not as regards the debts. The costs should be rateably apportioned between the two mortgages. Those which are applicable to the foreclosure and redemption of one property must be attributed to that property, while those which are applicable to the foreclosure and redemption of the other must be attributed to that other.

The case of *Clapham* v. *Andrews* has been referred to, where there were two mortgages by one mortgagor, who was entitled under the provisions of the *Conveyancing Act*, 1881, to redeem the mortgaged properties separately. The learned Judge thought the proper course was to make the whole of the costs chargeable against each estate. In my opinion that view is erroneous, as it really amounts to a consolidation as regards costs, although by legislative enactment the mortgagor is allowed to redeem separately.

(1) 27 Ch. D. 679.

BOWEN, L.J. (agreed in holding that there was no agreement to consolidate, and continued):—

Upon the question of costs I agree with Lord Justice *Cotton*, and also with what he has said with respect to the case of *Clapham* v. *Andrews* (1).

FRY, L.J.:—

I agree, and I also share in the doubts expressed by the other members of the Court as to the correctness of the decision in *Clapham* v. *Andrews*.

Solicitor for Appellant: *W. S. Norton.*
Solicitor for Respondent: *W. De Caux.*

(1) 27 Ch. D. 679.

M. W.

V.-C. B. 1886 Feb. 10.

DRIFFIELD AND EAST RIDING PURE LINSEED CAKE COMPANY *v.* WATERLOO MILLS CAKE AND WAREHOUSING COMPANY.

[1885 D. 606.]

Patent—Infringement—Threatening Legal Proceedings—Private Letter—Injunction—"Circulars, Advertisements, or otherwise"—Ejusdem generis—Patents, Designs, and Trade-marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.

Threats "by circulars, advertisements, or otherwise" (*Patents, Designs, and Trade-marks Act*, 1883, s. 32), include threats by private letter, to the person charged with infringement, the words "or otherwise" not being restricted, on the *ejusdem generis* principle, to "or other means such as circulars or advertisements."

The solicitors to the Defendants, a company, sent a letter to the Plaintiffs, another company, alleging an infringement of patents claimed by the Defendants, and stating that unless the Plaintiffs forthwith discontinued the infringement legal proceedings would be taken. The Defendants not having followed up the letter by legal proceedings, the Plaintiffs brought an action for an injunction, under sect. 32 of the *Patents, Designs, and Trade-marks Act*, 1883, to restrain them from making or continuing threats of legal proceedings. The Defendants in their statement of defence alleged that the Plaintiffs had infringed the patents, but afterwards, by amendment, struck out the allegation:—

Held, that the Plaintiffs were entitled to a perpetual injunction, with costs.

THE Plaintiffs and the Defendants were both manufacturers of oil cake for cattle food. On the 17th of December, 1884, the Defendants' solicitors wrote the following letter to the Plaintiffs: "We have been consulted by the *Waterloo Mills Cake and Warehousing Company* with reference to the infringement by you of patents held by them in connection with the manufacture of round feeding cake, and we have been instructed to give you notice, as we now do, that you have been and are infringing those patents, and that unless you forthwith discontinue such infringement legal proceedings will be taken in order to compel you to do so." The Plaintiffs then requested to be informed of the number and date of the patents said to be infringed, and this information was given them by letter from the Defendants' solicitors.

Further correspondence then followed, in the course of which the Plaintiffs asked for particulars of the alleged infringements, and on the 13th of January, 1885, the Defendants' solicitors again wrote to the Plaintiffs that their clients desired them to confirm the notice previously given and to say that they declined to give the details asked for, "but to intimate to you that our clients will, if their patents are infringed by your company, take the necessary legal steps to protect their rights as also to recover damages for the injury they may sustain." In their reply of the following day, the Plaintiffs insisted that there was no ground for complaint, and characterised the Defendants' refusal to furnish particulars of objections as unfair and unreasonable.

On the 16th of March, 1885, the Plaintiffs commenced this action, claiming an injunction to restrain the Defendants from making or continuing threats of legal proceedings or liability, "by circulars, advertisements, or otherwise," in respect of the alleged infringement of the patents claimed by the Defendants, and damages. The statement of claim denied infringement, and alleged that the Defendants had refused to desist from their threats, but nevertheless had not commenced any legal proceedings to assert their alleged rights.

In their statement of defence the Defendants alleged that they were the owners of the patents in question, and that the Plaintiffs had infringed the patents. They also admitted that they had not followed up their letters by legal proceedings, but submitted whether, under the *Patents, Designs, and Trade-marks Act*, 1883, the Plaintiffs were entitled to any of the relief claimed. Subsequently the Defendants amended their defence by striking out the allegation that the Plaintiffs had infringed the patents. The action now came on for trial. The chairman of the Plaintiff company deposed, on the question of damages, that since the Defendants' threats the Plaintiffs had stopped the progress of certain new works in course of erection and by which the Plaintiffs hoped considerably to extend their business.

Aston, Q.C., *Millar*, Q.C., and *Chadwyck Healey*, for the Plaintiffs:—

Our action is brought under sect. 32 of the *Patents, Designs,*

V.-C. B. 1886 — DRIFFIELD AND EAST RIDING PURE LINSEED CAKE COMPANY v. WATERLOO MILLS CAKE AND WAREHOUSING COMPANY.

and Trade-marks Act, 1883, which enacts that "where any person claiming to be the patentee of an invention, by circulars advertisements or otherwise threatens any other person with any legal proceedings or liability in respect of any alleged manufacture use sale or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats: Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent." The two threatening letters of the 17th of December and the 13th of January fall expressly within the terms of this section, and we therefore claim the statutory remedy of (1) an injunction, and (2) damages.

Marten, Q.C., and *Kenyon Parker*, for the Defendants:—

First, there has been no threat at all, but only an intimation that if our patents are infringed we shall bring an action.

Secondly, even if the letters do constitute a threat, we submit that it is not such a threat as is contemplated by the statute. If the Plaintiffs come within the section at all, they must bring their case within the words "or otherwise;" but those general words are controlled by the preceding expressions, and must be confined to threats by circulars or advertisements, or by public intimations of the nature of circulars or advertisements. "According to a well established rule in the construction of statutes, general terms following particular ones apply only to such persons or things as are *ejusdem generis* with those comprehended in the language of the Legislature:" Per *Cockburn*, C.J., in *Reg.* v. *Clewortli* (1); *Sandiman* v. *Breach* (2), both being cases on the *Lord's Day Acts*; *Reed* v. *Ingham* (3), on the *Thames Navigation Act*, and *Willis* v. *Thorp* (4), on the *Hosiery Manufacture* (*Wages*) *Act*, 1874.

(1) 4 B. & S. 927, 932.
(2) 7 B. & C. 96.
(3) 3 E. & B. 889.
(4) Law Rep. 10 Q. B. 383, 387.

The present Act was intended to strike at the common practice that previously prevailed, and that was permitted by law, of the publication by alleged patentees, by means of circulars and newspaper advertisements, of threats and cautions—a practice that often occasioned serious embarrassment and interference with a trader's business. But a mere private letter, not leading to publicity, cannot have such an effect. Moreover, the section points to a "continuance" of threats, not to a single isolated threat. The Plaintiffs have not alleged or proved that the Defendants intend to "continue" their conduct. As to the alleged damages, they are too remote and are only contingent. The Plaintiffs have shewn unreasonable delay in bringing their action, and issued their writ without any notice.

Aston, in reply :—

This letter is clearly a threat, and the words of the section are wide enough to cover, and are intended to cover, every form of threat, whether by circular, advertisement, or letter, which can be shewn to interfere with the lawful calling of the person threatened, and which the person who makes it is unable or afraid to justify by legal proceedings. The Act extends its protection generally to "any person or persons aggrieved" by threats, the object being to prevent any person whomsoever being harassed by unfounded threats. What can be more harassing to a trader or more likely to interfere with his business than a lawyer's letter threatening legal proceedings? Such a letter is the most aggravated form of threat. Although under the old law an alleged patentee might threaten proceedings without being obliged to follow them up, yet unless he made the threat *bonâ fide*, he rendered himself liable to an injunction: *Halsey* v. *Brotherhood* (1). Under the present law, the person making the threats can only escape an action for injunction and damages by commencing and prosecuting with due diligence an action for infringement, which the Defendants here have not done. The old authorities cited have no application to the present case, for they related only to statutes which, as they imposed penalties, the Court held must be strictly construed. Our alleged delay in issuing the

(1) 15 Ch. D. 514.

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writ arose from our waiting to see whether the Defendants would follow up their threats by action. Had they done so, we could not have maintained the present action. As to our claim for damages, the evidence shews the injury to be immediate, our new works having been stopped, and the exercise of our lawful calling having thus been arrested.

BACON, V.C.:—

The only important question before me is upon the construction of the recent *Patents Act*. As far as I know, this is the first time that this particular question has been submitted for decision under the statute.

The question that has been argued is, whether this case comes within the 32nd section of the Act so as to justify the Plaintiffs in instituting this action.

A very long, elaborate, and learned argument has been addressed to me upon the *Lord's Day Acts*, and upon the *Thames Navigation Act*. It is a maxim that you cannot construe a penal statute otherwise than with the utmost strictness, and that if there are any means afforded to the Court of avoiding too severe a construction of it, the Court will avail itself of those means, and it has done so in cases under those Acts, and others of the same class. All that is plain law, and nobody can dispute it; but here we have a new law. The law, as it stood before the new *Patents Act*, enabled persons who were patentees, or who alleged they were patentees, to fulminate their threats against anybody they liked, cautioning them not to invade the rights which the patentees, or alleged patentees, said or thought they had. To put a stop to this, an alteration in the law was made. The 32nd section of the *Patents, Designs, and Trade-marks Act*, 1883, says: "Where any person claiming to be the patentee of an invention, by circulars advertisements or otherwise threatens any other person"—words which have wholly escaped notice in the course of the argument to-day, but which lend a key to the whole construction of the Act—"with any legal proceedings," and so on, the person aggrieved may obtain an injunction.

The present Defendants, saying that they are patentees, have threatened another person (the Plaintiff company being a person

for this purpose) with legal proceedings. Under those circumstances, can there be any question upon the facts before me that thereupon the right which the section gives to the person so threatened exists, and that such person has a right to bring his action? The first letter, that of the 17th of December, 1884, containing the threat, has never been departed from or qualified. It was argued that there was no "continuation" of the threat; but it has never been withdrawn, and therefore it has been continued. It has been continued down to the present time, except only for the change which has been made in the defence by striking out the assertion that the Plaintiffs have infringed the patents.

Have the Defendants threatened the Plaintiffs? That is, really, the only question I have to decide. Can I reject the words "any other person"? Can I, from the nature of the case, confine the word "threats" to threats by circulars and advertisements? Each circular must be directed to some person in order to be useful; and the words "any other person," in my opinion, plainly bring the letter which was written in the first instance within the provisions of this statute.

Without straining the words of the statute, or having any hesitation or doubt about the meaning of the words, I say this is a case in which a patentee, or alleged patentee, threatens another person that he will take proceedings against him. In my opinion, that gives the person so threatened a clear right, under the 32nd section of the Act, to bring his action, since the threatener does not avail himself of the proviso by which the onus is thrown upon the alleged patentee of taking proceedings. He is protected from the consequences of his threat if he takes proceedings to enforce his threat; otherwise there remains only that sort of annoyance and unjust threat which it is the object of this statute to check and control, and, if necessary, to punish.

On this part of the case, therefore, I think the Plaintiffs are perfectly justified, in consequence of the threat "you have infringed and I am going to prosecute you," in coming to this Court and asking for an injunction to restrain the Defendants from continuing their threat.

As to the rest of the case, I think no case whatever has been

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made out for an inquiry as to damages. It has not been alleged, in any way that I can notice, that any damage has been sustained by the Plaintiffs. Their business has not been suspended. Certain works contemplated have not been carried out with the vigour at first displayed, but the business has not been stopped.

In my opinion, the Plaintiffs are entitled to a perpetual injunction as asked by their claim, and also to the costs of the action; and I pronounce judgment accordingly.

Solicitors: *Andrew, Wood, & Glasier; Chester, Mayhew, & Co.*, agents for *Holden, Sons, & Hodgson, Hull.*

G. I. F. C.

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In re ARMY AND NAVY HOTEL.

Company—Winding-up Order—Title of Petition—Mistake—Amendment—Advertisement.

A winding-up order had been pronounced on a petition intituled, "In the matter of the *A. and N. Hotel Company, Limited.*" Subsequently, before the order was drawn up, the Petitioners discovered that the word "company" did not form part of the registered title of the company, though the company had themselves, while carrying on business, usually adopted the word. Thereupon, on an *ex parte* application by the Petitioners, the Court made an order giving leave to amend and re-advertise the petition, and directing the winding-up order to be drawn up seven days after the advertisement.

A motion by the company to discharge the *ex parte* order was dismissed with costs.

ON the 17th of December, 1885, Messrs. *Hudson, Brothers*, as creditors, presented a winding-up petition intituled "In the matter of *the Army and Navy Hotel Company, Limited.*" The petition was duly served upon the company the same day, and on the 16th of January, 1886, the usual winding-up order was made on an affidavit of service, the company not appearing, but creditors and contributories appeared by counsel and supported the petition.

On the parties attending before the Registrar to settle the order, the company raised the objection that they had been misdescribed in the petition, and produced a print of their articles

of association in which they were described as "*The Army and Navy Hotel, Limited,*" the word "company" being omitted. Thereupon the Registrar refused to draw up the order.

On the 5th of February, 1886, upon an *ex parte* application by the Petitioners, His Lordship made an order giving them leave to amend and re-advertise the petition, and directing the winding-up order to be drawn up seven days after the date of the advertisement.

The company now moved to discharge the order of the 5th of February, on the ground of want of jurisdiction.

From the evidence read upon the motion it appeared that prior to the presentation of the petition the Petitioners commenced an action against the company for the recovery of their debt, the company being described in that action as "*The Army and Navy Hotel Company, Limited,*" and that after the presentation of the petition the company obtained in the action, on an *ex parte* application, an order staying all proceedings in the action until the hearing of the petition, no objection being then made as to the incorrectness of the name under which the company had been sued: also that before commencing their action the Petitioners found, on searching the Registry of Companies at *Somerset House*, that the yearly accounts filed by the company were headed "*The Army and Navy Hotel Company, Limited,*" and that this led to the action being brought and the petition presented against them under that name: that on a further search made at *Somerset House* in consequence of the company's objection, the Petitioners had found the company described in earlier files of proceedings and also in the articles of association as "*The Army and Navy Hotel, Limited,*" and that they had been registered under that name, though on subsequently registering a change of address they adopted the word "Company."

Millar, Q.C., and *Boome*, for the Company:—

We rely on *In re City and County Bank* (1). In that case the company was described correctly in the petition but incorrectly in the advertisements, and it was held that the error rendered the advertisements invalid. Here the mistake is in both the

(1) Law Rep. 10 Ch. 470.

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petition and the advertisements. The Court has no jurisdiction to amend a petition on which an order has been made, or to amend an order when made: *Re North Wales Slate Supply Company* (1). The Petitioners are themselves responsible for the mistake, which they might have avoided had they shewn due diligence in making inquiries.

Marten, Q.C., and *Maidlow*, for the Petitioners:—

The company have themselves adopted the name on the petition, for they not only made no objection to their being sued under that name in the action in the Queen's Bench Division, but themselves obtained, under that name as it stood on the record, the order staying proceedings in the action pending the petition. Again, the company's annual returns were made under the same name. Thus the error in the petition has been brought about by the company's own fault.

No one could be misled by the slight difference in the name.

As regards the winding-up order, the Court may correct it under the slip order: Rules of the Supreme Court, 1883, Order XXVIII., rule 11. Then, irregularity in advertisements does not necessarily invalidate a winding-up order. Under rule 53 of the Gen. Ord. under the *Companies Act*, 1862, the Court has a discretionary power to dispense altogether with the advertisements prescribed by rule 2: *In re City and County Bank* (2).

There have been several instances in which the Court has made winding-up orders notwithstanding irregularity in the advertisements: *In re Shields Marine Insurance Company* (3); *Re London India Rubber Company* (4); *In re Consolidated Mineral Lead Mining Company* (5).

Boome, in reply:—

I admit the Court has a discretion as to advertisements; but this is a case of petition presented, advertisements issued, and order made, all in the wrong name. There is no authority that under such circumstances the order can be sustained.

(1) 18 W. R. 403.
(2) Law Rep. 10 Ch. 470.
(3) W. N. 1867, p. 296.
(4) 14 W. R. 527, 594.
(5) 25 W. R. 36.

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BACON, V.C., said the jurisdiction to make the order of the 5th of February was clear and could not be questioned. The evidence had satisfied him that the mistake in the title of the petition was purely accidental, and that the Petitioners had been led into the mistake by the company, who had themselves adopted the erroneous title. A more unreasonable application he had never heard, and he dismissed it with costs.

Solicitors: *Barnard & Co.; Ford, Lloyd, Bartlett, & Michelmore.*

G. I. F. C.

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[1881 G. 950.]

Marriage Settlement—Wife's after-acquired Property — Covenant to settle—Release by Wife in mistake before Marriage set aside after—Additional Property coming to her thereby.

By a marriage settlement made in 1859, after a recital that the wife was entitled, amongst other property, to £10,000, part of her share of the residue of a testator's estate, in the hands of the executors of a will and secured by mortgage, this £10,000 was settled, and the husband and wife covenanted for the settlement of all the estate, property, and effects exceeding £300 at one time which the husband and wife, or either of them in her right, should at any time or times subsequent to the marriage and during the coverture become possessed of or entitled to at law or in equity by any means whatsoever. The day before the settlement, the wife, then a spinster and of full age, had executed a general release to the executors of the will of all her claims to the estate of the testator. It subsequently appeared that her share in the residue was greatly in excess of the amount at which it was stated in the release, and on the 10th of February, 1885, while the coverture was still subsisting, an order was made by the Court of Appeal setting aside the release :—

Held, first, that the covenant did not apply to any personal property (other than the £10,000) to which the wife was entitled at the moment of the marriage; secondly, that as the right to recover anything further in respect of the wife's share of the residue had been barred by the release, and only revived when it was set aside by the order of the Court, the additional residuary property thus recovered must be treated as having come into existence, or at any rate into possession, at the date of the order; and thirdly, that not only the capital sum recovered, but also the income thereon up to the date of the order, must be treated as a lump sum falling in when the release was set aside, and consequently as bound by the covenant.

JEREMIAH GARNETT, who died in May, 1855, by his will dated in April, 1855, gave all the residue of his personal estate to his sister, *Henrietta Garnett*, and *Richard Baxter*, upon trust for sale and conversion, and gave one moiety of the residue of the moneys produced thereby, after payment of his debts and funeral and testamentary expenses, in trust for the said *Henrietta Garnett*, and the other moiety in trust for his nieces, *Mary Hester Orme* and *Frances Orme*, absolutely in equal shares.

By an indenture of release dated the 26th of September, 1859,

and made between *Mary Hester Orme* of the first part, *Frances Orme* of the second part, and *Henrietta Garnett* and *Richard Baxter* of the third part, after reciting that all the debts and funeral and testamentary expenses of the testator, *Jeremiah Garnett*, had been paid, and that on taking the account there was found to be a balance available for distribution arising from his residuary personal estate, after payment of all legacy duties and other outgoings, amounting to £42,202 10*s.* 6*d.*, which had since been distributed as follows, viz. :—£21,101 5*s.* 3*d.* to *Henrietta Garnett*, £10,550 12*s.* 7½ to *Mary Hester Orme*, and £10,550 12*s.* 7½*d.* to *Frances Orme*; and that the said *Mary Hester Orme* and *Frances Orme* being satisfied with the correctness of the said account had agreed to execute to *Henrietta Garnett* and *Richard Baxter* a general release; it was witnessed that the said *Mary Hester Orme* and *Frances Orme* declared that they had received the aforesaid sums, and acknowledged the same to be in full for all the share and interest to which they were entitled in the residuary personal estate of the testator under his will, and in consideration thereof they released *Henrietta Garnett* and *Richard Baxter* in general terms from the trusts of the will so far as concerned any claims which they had as residuary legatees under the will. At the date of this release both *Mary Hester Orme* and *Frances Orme* were of full age.

By an indenture of settlement, dated the following day, September 27, 1859, and made upon the marriage of *Frances Orme* with *Henry Gandy*, after reciting that she was absolutely entitled, amongst other property, to a sum of £10,000, part of her share of the residuary personal estate bequeathed by the will of her uncle, *Jeremiah Garnett*, which sum of £10,000 was in the hands of her aunt, *Henrietta Garnett*, bearing interest at 4 per cent. per annum, and which sum and interest it had been agreed was to be secured by a mortgage of certain property; and that such a mortgage had been made by a deed of even date, and that such deed contained an agreement that the £10,000 was to be held upon the trusts of that settlement; and that it had been agreed that the intended husband and wife should respectively "enter into such covenants for the settlement of the future real and personal estate" of the intended wife as thereinafter

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contained, the £10,000 was settled upon certain trusts thereinafter mentioned, and each of them, the said *Henry Gandy* and *Frances Orme*, "in pursuance of the said recited agreement," covenanted with the trustee "that all the estate, property, and effects whatsoever, both real and personal, exceeding at any one time the sum of £300 in value, other than and except such as shall be of a chattel nature alone, which the said *Henry Gandy* and the said *Frances Orme*, or either of them in her right, shall at any time or times subsequent to the solemnization of the said intended marriage and during the said intended coverture become seised or possessed of or entitled to either at law or equity under any gift, devise, or bequest in her favour, or by descent, representation, or any other means whatsoever, shall be assured and settled" upon the trusts thereinbefore declared concerning the £10,000, or as near thereto as circumstances would admit.

By an indenture of settlement, dated the 25th of April, 1860, and made upon the marriage of *Mary Hester Orme* with *George Robinson* (afterwards *George Garnett-Orme*), a sum of £13,200 was settled by the intended wife, and she and the intended husband entered into covenants for the settlement of her after-acquired property in terms practically identical with those of the covenant in that respect contained in the marriage settlement of Mrs. *Gandy*.

Henrietta Garnett died intestate in September, 1879, and letters of administration of her estate and effects were granted to Mrs. *Gandy* and Mrs. *Garnett-Orme* as her sole next of kin.

After her death it was discovered that the value of the shares of Mrs. *Gandy* and Mrs. *Garnett-Orme* in the residuary personal estate of the testator had been greatly understated in the release of the 26th of September, 1859. And it appeared that owing to an increase in the value of the securities comprised in the estate, and to the subsequent payment of a legacy to which the testator was entitled at the time of the account, but which was not included therein, and to other accretions, the shares of Mrs. *Gandy* and Mrs. *Garnett-Orme*, instead of being only £10,550 in value, were worth over £15,000, and consequently that they ought each to have received nearly £5000 more at the time of the release. It appeared also that none of the parties to the release

were aware of the mistake, and that that instrument had been executed in perfect good faith.

All the assets of *Jeremiah Garnett* having been in the hands of *Henrietta Garnett*, proceedings were commenced for the administration of her estate, in course of which Mrs. *Gandy* and Mrs. *Garnett-Orme* carried in claims for their additional shares of residue. It was, however, decided in Chambers that the release, until set aside in an action instituted for the purpose, was a bar to any further claims by the releasors, and accordingly further proceedings were instituted, and ultimately an order was made by the Court of Appeal on the 10th of February, 1885 (1), by which it was declared, reversing an order of Vice-Chancellor *Bacon*, that in administering the estate of *Henrietta Garnett* the release was not to be treated as a binding release of all claims of Mr. and Mrs. *Gandy* and Mr. and Mrs. *Garnett-Orme* in respect of the residuary estate of *Jeremiah Garnett*.

The action for the administration of *Henrietta Garnett's* estate now came on for further consideration, the principal question being whether the further moneys thus coming to Mrs. *Gandy* and Mrs. *Garnett-Orme* in respect of the residuary personal estate of the testator, were bound by the covenants to settle after-acquired property contained in the respective marriage settlements of those ladies.

W. Pearson, Q.C., and *Shebbeare*, for Mrs. *Gandy* and her husband:—

These additional moneys were in existence, and formed part of the property of each of these two ladies at the time of her marriage, and are not included in the covenants to settle after-acquired property comprised in their respective marriage settlements, which only apply to property of or to which they may "become" possessed or entitled "at any time or times subsequent to" the marriage: *In re Clinton's Trust* (2); *In re Pedder's Settlement Trusts* (3); *Archer* v. *Kelly* (4); *In re Jackson's Will* (5); *Churchill* v. *Shepherd* (6); *In re Browne's Will* (7); *Wilton* v.

(1) See *In re Garnett, Gandy* v. *Macaulay*, 31 Ch. D. 1.
(2) Law Rep. 13 Eq. 295.
(3) Ibid. 10 Eq. 585.
(4) 1 Dr. & Sm. 300.
(5) 13 Ch. D. 189.
(6) 33 Beav. 107.
(7) Law Rep. 7 Eq. 231.

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Colvin (1); *Elphinstone*, *Norton*, and *Clark* on the Interpretation of Deeds (2).

Robinson, Q.C., *W. C. Druce*, and *R. J. Parker*, for the trustees of Mrs. *Gandy's* and Mrs. *Garnett-Orme's* settlements:—

This *chose in action* came into existence, or at all events into possession, after the marriage, *i.e.*, at the date of the order by which the release was set aside, for so long as the release subsisted neither these ladies nor their husbands had any title. It is consequently bound by the covenant. If, however, it belonged to the ladies at the time of the marriage, it is still bound by the covenant of the husband, who becomes entitled to it when he obtains possession of it. This must be at one of three times, all of which are subsequent to the marriage, *i.e.*, when the Court directs the payment, when the release has been set aside, or upon the marriage—and if he obtained title by the marriage, it was a title which accrued after the marriage, for it depended upon the marriage as a condition precedent: *Williams* v. *Mercier* (3); *James* v. *Durant* (4).

Hastings, Q.C., and *Ingle Joyce*, for Mrs. *Garnett-Orme*:—

The covenant was not intended or framed to include anything to which the husband would become entitled at the moment of the marriage.

They referred to *Anonymous Case* (5).

W. Pearson, in reply:—

This is not property to which the husband became entitled after the marriage within the meaning of his covenant, for it is property to which he became entitled as a purchaser for value at the indivisible instant of the marriage.

Mr. *Garnett-Orme* did not appear.

1885. Dec. 5. KAY, J.:—

I have no doubt that the true construction of the covenant in the marriage settlement of Mrs. *Gandy* is that it does not include

(1) 3 Drew. 617.
(2) Pages 513 *et seq.*
(3) 10 App. Cas. 1.
(4) 2 Beav. 177.
(5) 31 Beav. 310.

any of the personal property other than the £10,000 to which Mrs. *Gandy* was entitled in possession at the moment of the marriage. The recital plainly shews that it was understood that she might have other property, and that only her future property was to be comprised in the covenant, and the case differs from *Williams* v. *Mercier* (1), not only because of that recital, but because of the introduction of the word "subsequent" into the covenant, which was evidently used for the purpose of excluding all such other property of the wife as would vest in the husband at what is in that case called "the indivisible instant" of the marriage, so that the covenant should only comprise that which might be acquired afterwards.

It now appears that the release was given under a mistake, and by an order of the Court of Appeal dated the 10th of February, 1885, in an action for the administratiou of the estate of the uncle, which by agreement was treated as being made in a proper proceeding for the purpose of setting aside the release, the Court declared that in administering the estate of *Henrietta Garnett* the release was not to be treated as a binding release of all claims by Mr. and Mrs. *Gandy* and her sister *Mary* in respect of the residuary estate of their uncle.

This raises an extremely curious question. It seems that the residue of the uncle's estate was larger than was stated in the recitals of the release, though the parties were ignorant of the fact at the time, and that the share of each of them exceeded by some thousands of pounds the amount there mentioned.

The argument before me has proceeded mainly upon technical grounds. Technically I suppose the true statement of the position would be this: The share of each of these ladies as between them and the executors was an equitable *chose in action*. To any action to recover more than they received the release would be a complete bar. Until that release was set aside the *chose in action* was therefore practically gone. Upon the setting aside of the release on the 10th of February, 1885, the *chose in action* revived. The release was not void until affirmed, but valid until rescinded.

It is argued on the one side that the *chose in action* must be treated as having been in existence and in the lady's possession

(1) 10 App. Cas. 1.

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at the date of the marriage. On the other hand it is said that it must be treated as having come into existence, or at any rate into possession, at the date of the order setting aside the release. My opinion is in favour of the latter view. Anything of which the wife had not possession at the date of the marriage but which fell into possession during the coverture would be bound by this covenant: *Archer* v. *Kelly* (1); *In re Michell's Trusts* (2). Possession of this could not have been obtained without the preliminary step of setting aside the release.

Suppose the money had been left to her by will before the marriage upon condition that she should succeed in setting the release aside, and she only did so during the coverture, the fund would clearly be bound. The condition was not imposed by will, but it was none the less a condition precedent to her obtaining the money, and it had not been fulfilled at the date of the marriage, and was only fulfilled when the order of the Court to which I have referred was obtained. It is no answer to say that she might have set aside the release before her marriage, any more than it would be an answer in the case I have supposed.

For these reasons it seems to me that the sum recovered by means of and consequent upon the order setting aside the release is as completely within the meaning and intention of the covenant as though it had come to the wife on the 10th of February, 1885, by the gift of a testator who died on that day, and I think it would be defeating the general and manifest intention of the deed if I were to hold that it was not within it.

Precisely the same question arises upon the marriage settlement of the sister, which is in almost identical terms, and I therefore hold in each case that the property recovered consequent upon the setting aside the release is included in these settlements.

Hastings, Q.C.:—

Your Lordship's order does not extend to the income.

Robinson, Q.C., on behalf of the trustees:—

I would submit that the whole amount, income as well as capital,

(1) 1 Dr. & Sm. 300. (2) 9 Ch. D. 5.

ought to be settled, for the nature of the claim was that a certain sum became due at the time the release was set aside, which sum carried interest with it up to that date—not interest which had been accruing from time to time which the husband might claim, but interest which must go with the principal, in the nature of damages for not having paid that principal at the proper time.

Hastings, Q.C.:—

This interest was income acquired after the marriage to which the lady became entitled as such, and there is no authority to bring it within a covenant to settle after-acquired property.

KAY, J.:—

This is rather a curious point, and I should like to have it further considered and argued before me.

Dec. 12. The case accordingly came again for consideration upon the question of interest.

Hastings, Q.C., and *Ingle Joyce*, for Mrs. *Garnett-Orme*, cited *St. Aubyn* v. *Humphreys* (1); *Fyfe* v. *Arbuthnot* (2).

W. Pearson, Q.C., and *Shebbeare*, for Mr. and Mrs. *Gandy*:—

The income and the capital ought to be treated as if the capital had been brought into settlement at the proper time.

Robinson, Q.C., *W. C. Druce*, and *R. J. Parker*, for the trustees of Mr. and Mrs. *Gandy's* and Mr. and Mrs. *Garnett-Orme's* marriage settlement, cited *Lewis* v. *Madocks* (3); *Life Association of Scotland* v. *Siddal* (4).

Hastings, in reply.

KAY, J.:—

When I was considering this case I anticipated that this question would be probably raised on the result of the decision I have come to, but that decision seems to me really to conclude

(1) 22 Beav. 175.
(2) 1 De G. & J. 406.
(3) 17 Ves. 48.
(4) 3 D. F. & J. 271.

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it. Right or wrong, the view I have taken is this, that the right to this fund cannot be treated as having been practically in existence until the release was set aside; that then, when the release was set aside, the money was recovered as though the setting aside the release was a condition precedent to the recovery of any part of it. Therefore I likened it to the case of a person leaving a legacy to one of these ladies on condition that she should first of all set aside this deed of release, in which case the legacy would of course only become due when the release was set aside.

Now supposing, to take the same illustration, that the legacy had been left in these terms: "I leave £1000 to Mrs. *Gandy* upon condition that she first of all sets aside" a certain deed of release, naming it; "if she does, then she shall have my legacy together with interest at 4 per cent. from the date of this my will." Of course the release must first be set aside, and when it is set aside she then becomes entitled to the £1000, and she also becomes entitled to what you cannot fairly call an arrear of interest, but a sum computed on the footing of interest from a particular date—and really it would make no difference whatever in the effect of a bequest of that kind if it had been—"I give £1500 principal and interest as a lump sum," because whatever was given in the name of interest would only come in as a legacy and in a lump sum upon the condition precedent being performed.

Now is there any difference in point of principle between the case which I have just put, and that which I have now to consider? If the setting aside of this release was, as I think it was, a condition precedent to her getting any of this money—on which theory alone, as it seems to me, any part of it comes within the settlement—then how can I, because this lady on setting aside the release becomes entitled to a capital sum, and also to a sum in the nature of an arrear of interest to not one penny of which she was entitled until the release was set aside—how can I on that account make a distinction between those two sums for the purpose of this question of settlement. I think that each of these sums is bound by the covenant in the settlement.

Of course any income accruing on either of those funds after the release was set aside would be treated as income of the capital

fund bound by the settlement. That is a different case. The authorities cited which have reference to this question, whether a covenant of this kind binds a mere life interest afterwards obtained by the covenantor, are quite a different thing. The only analogy would be as to the income afterwards accruing. Of course income afterwards accruing is only to be treated as income for the purpose of the settlement, but the actual sums obtained, whether in the name of arrears of income or in the name of capital, by setting aside the release, I must treat as being bound, as though they were capital sums, by these covenants in the settlements.

Solicitors: *Johnston, Harrison, & Powell; J. F. Gandy; Richard Smith & Wilmer.*

W. W. K.

CHITTY, J.

1885

Dec. 10, 15, 21.

WILSON *v.* KENRICK.

[1865 W. 236.]

Power—Appointment—Revocation and New Appointment—Successive Appointments—Priority.

By deed of October, 1860, the donee of a power of appointing £6000 amongst his children, irrevocably appointed £500 to his daughter *B.*, and, subject to revocation, appointed the £5500 residue to his daughter *C.*

By a subsequent deed the appointment of £5500 was revoked, and the hereditaments subject to the power were charged with £1600 to *C.* and £3900 to *B.*, in lieu of the £5500 charged by the first deed, and "subject and without prejudice to the trusts for raising the £500," trusts for raising the £1600 and £3900 were declared. This deed contained a power of revocation and new appointment, confined, however, to the £3900. By a subsequent deed the appointment of £3900 was revoked and that sum was appointed between *B.* and *C.* in the proportions of £300 to *B.* and £3600 to *C.*, in addition to the sums of £500 and £1600 then respectively remaining charged thereon—and it was directed that all the sums raisable under the trusts of the term under the three deeds, should be charged and chargeable on the property *pari passu* and without priority:—

Held, that the £500 irrevocably appointed by the first deed had priority over the other charges, and that this priority was unaffected by the direction that the charges should rank *pari passu* and without priority; and accordingly that, subject to any question as to election, the £500 had priority, and that the several charges amounting to £5500 stood subsequent to the £500, but *inter se* ranked *pari passu*.

ADJOURNED SUMMONS.

By an indenture of appointment, release, and settlement of the 2nd of October, 1833, it was declared that it should be lawful for *George Kenrick* at any time during his life, by deed or deeds, or by his last will (but subject and without prejudice to the several charges thereby created and authorized to be created), to charge all or any of the hereditaments thereby assured with any sum or sums of money for portions of the children of *George Kenrick* by *Louisa Kenrick*, or by any after-taken wife, either before or after such marriage, but not exceeding £6000 in the whole for such portion or portions, the same, together with interest on the same sum at £5 per cent. per annum, as by way of maintenance, to be raised by such ways and means, and to be paid at such time

or times, and in such manner as *George Kenrick* should appoint by any deed or deeds, or by his last will; and for more easily raising such portions [it should be lawful for *George Kenrick*] to appoint (but subject and without prejudice as aforesaid) all or any of the premises charged therewith to a trustee or trustees for any term or terms defeasible on full payment of the sums thereby to be secured and legal interest for the same, and all reasonable costs and charges incident thereto.

By indenture of the 4th of October, 1860, *George Kenrick*, in exercise of the power of appointment reserved to him by the settlement of October, 1833, charged the hereditaments with the sum of £6000, and as to £500, part thereof, for the portion of *Sybella Mary Georgina*, and as to £5500, residue thereof, for the portion of *Adelaide Louisa*; the said sums of £500 and £5500 to be paid with interest at such times and in such manner as thereinafter mentioned. And in further exercise of the same power, *George Kenrick* appointed that the hereditaments should remain and be to the use of the trustees (*Kent* and *Wolstenholme*) for the term of 3500 years upon trust by mortgage, sale, &c., to raise and pay the sum of £6000 for the portions of *Adelaide Louisa* and *Sybella Mary Georgina*, with interest at 5 per cent. from the death of *George Kenrick*; the said sums of £5500 and £500 to be interests vested in the daughters immediately after execution of this deed, but payment to be postponed until the death of *George Kenrick*. Power was reserved to *G. Kenrick* of revoking by deed or will the appointment thereby made, and of making any other charge and appointment consistent with and authorized by the powers in the settlement of October, 1833, and intended to be thereby exercised in lieu of the revoked appointments, but with a proviso that such power of revocation and new appointment should not extend to or affect the £500 appointed to *Sybella Mary Georgina*.

Several deeds of revocation and appointment were afterwards executed by *George Kenrick*. By a second deed of appointment (19th of July, 1861), he revoked the charge and appointment of the £5500 and the trusts of the term, so far as they related to that sum, and charged the hereditaments with the payment of £1600 in favour of *Adelaide Louisa*, and £3900 in favour of

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Sybella Mary Georgina, and "subject and without prejudice to the trusts for raising the sum of £500," declared trusts for raising the £1600 and £3900. This deed also contained a power of revocation and new appointment, limited however to the £3900. The next deed of revocation and new appointment was dated the 8th of January, 1862, by which the appointment of the £3900 was revoked and £300 was appointed to *Sybella Mary Georgina*, and £700 and £2900 to *Adelaide Louisa*. Trusts were declared for raising these sums, subject and without prejudice to the trusts declared by the previous deeds for raising the £500 and £1600 and a power of revocation and new appointment limited to the £2900, was reserved. It was also thereby declared that all the sums raiseable under the trusts of the term under the three deeds should be charged and chargeable on the property *pari passu* and without prejudice or priority. Several other deeds of revocation and new appointment were executed by *George Kenrick* varying the shares of the daughters, but not in such terms as to raise any fresh question.

Adelaide Louisa and *Sybella Mary Georgina* had both incumbered their respective interests under the deeds of appointment. The present application came before the Court, on summons adjourned from Chambers, on behalf of *R. B. Warrick*, who had been certified, as the transferee of an incumbrance from the two appointees, to be entitled to the sum of £1600 and interest, part of the portion of *Adelaide Louisa*, and also to the £500, part of the portion of *Sybella Mary Georgina*, for payment of the amount due to him for principal, interest, and costs, as a first charge on the funds in Court subject to the sum to be appropriated in respect of *George Kenrick's* life estate.

The question for argument was whether the portions of the two Misses *Kenrick*, which were charged on the settled estates by the several deeds by which the different sums making up the total amount limited by the power were from time to time appointed in their favour, ranked *pari passu*, and had to abate proportionally in consequence of the estate being insufficient, or whether they were payable in order of the dates of appointment.

J. M. Solomon, in support of the summons, contended that each

sum appointed must rank in priority according to the date of the deed of appointment, and that as *George Kenrick*, by the deeds of October, 1860, and July, 1861, had irrevocably appointed the sums of £500 and £1600 to be charges on the land, he could not, in derogation of his own grant, afterwards cut down those appointments and the sums payable thereunder, as he afterwards attempted to do in the deed of August, 1862, by charging other sums to rank *pari passu*.

Hadley, for the Misses *Kenrick*, and subsequent incumbrancers on their portions, contended that as powers of revocation and new appointment had been reserved, the charges, when the new appointments were made, took effect *pari passu*, so that the incumbrancer in respect of the £500 and £1600 was not entitled to any priority.

J. M. Solomon, in reply.

The following cases were cited: *Page* v. *Leapingwell* (1); *In re Harries' Trust* (2); *Trollope* v. *Routledge* (3); *Stokes* v. *Bridgman* (4); *Booth* v. *Alington* (5); *Coore* v. *Todd* (6); *Miller* v. *Huddlestone* (7); *De Lisle* v. *Hodges* (8); *Eales* v. *Drake* (9); *Farwell* on Powers (10).

1885. Dec. 21. CHITTY, J.:—

The general principles bearing on the question for decision are the following:—

1. Where under a power to appoint a definite fund among special objects an appointment is made of aliquot parts of the fund, or of parts of the fund exhausting the whole by one instrument, or by several instruments, which form one transaction and ought to be construed together, there *primâ facie* there is no priority, and the several parts of the fund, if the fund proves deficient, must abate rateably. This is the principle on which

(1) 18 Ves. 463.
(2) Joh. 199.
(3) 1 De G. & Sm. 662.
(4) 47 L. J. (Ch.) 759.
(5) 6 D. M. & G. 613.
(6) 7 D. M. & G. 520.
(7) Law Rep. 6 Eq. 65.
(8) Ibid. 17 Eq. 440.
(9) 1 Ch. D. 217.
(10) Pages 201, 217.

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Page v. *Leapingwell* (1) and many subsequent cases have been decided.

2. Where under a like power several sums are appointed by successive independent deeds, there *primâ facie* the sums or parts appointed, not being aliquot parts, have priority according to the dates of the deeds. This principle was acted upon by Vice-Chancellor *Hall* in *Stokes* v. *Bridgman* (2), and by Vice-Chancellor *Knight Bruce* in *Trollope* v. *Routledge* (3); and it was assumed in *Eales* v. *Drake* (4) by *Jessel*, M.R., who, in his judgment, speaks of the fund over which the power subsisted as being only £7000, treating the £3000 appointed by the prior deed as unquestionably having priority over the £7000, the residue of the original £10,000. In *Booth* v. *Alington* (5) the only appointment made was by deed appointing £30,000 "part" of the fund. Lord *Cranworth* held that this was sufficient to shew an intention to appoint the £30,000 at all events, and (the fund proving insufficient) that the £30,000 was entitled to priority.

3. Where under a power an appointment authorized by the power is made reserving a power of revocation and new appointment, and subsequently an instrument of revocation and new appointment is executed, the new appointment operates as an exercise of the original power.

In the case before me the power is a power to charge for the portions of all or any one or more of the children of *George Kenrick* any sum or sums of money not exceeding in the whole £6000, and to appoint a term to secure the portions. *George Kenrick* had two daughters, who were the only objects of the power. By the first appointment made by the deed of the 4th of October, 1860, *George Kenrick*, the donee of the power, charged the whole sum of £6000: as to "£500, part thereof," to one daughter, and as to £5500, residue of the said sum of £6000, to the other daughter, and limited a term with trusts to raise the £6000. So far it is clear that there was no priority between the two portions. The deed reserves a power of revocation and new appointment, confined, however, to the £5500, and the charge of that sum and the

(1) 18 Ves. 463.
(2) 47 L. J. (Ch.) 759.
(3) 1 De G. & Sm. 632.
(4) 1 Ch. D. 217.
(5) 6 D. M. & G. 613.

trusts to secure it. Neither the reservation, nor the particular terms in which it is expressed, are sufficient to give any priority to the £500. Had the donee of the power died without executing the power of revocation, the £500 and the £5500 would have abated rateably. By the second appointment made by the deed of the 19th of July, 1861, *George Kenrick* revoked the charge and appointment of the £5500 and the trusts of the term, so far as related to the £5500, and charged the hereditaments with the payment of £1600 to one daughter, and £3900 (in addition to the £500) to the other daughter; together making £5500, in lieu of the like sum of £5500 charged by the first deed, and, "subject and without prejudice to the trusts" for raising the £500, declared trusts for raising the £1600 and £3900. This deed contained a power of revocation and new appointment, confined, however, to the £3900, to the like effect as the power contained in the first appointment in reference to the £5500. In these circumstances the charge of £500 is, in my opinion, entitled to priority over the £5500, because (independently of any question arising from the circumstance that the two sums were appointed by separate deeds) by the express terms of the deed of 1861 the trusts for raising the £5500 are made subject to the trusts for raising the £500, and the charge of that sum is left unaffected.

For the reasons already stated as to the first deed, I think that upon the construction of the second deed standing alone the £1600 had no priority over the £3900.

By the third appointment, made by the deed of the 8th of January, 1862, *George Kenrick* executed the power of revocation reserved as to the £3900, and charged the hereditaments with the payment (in addition to the sums of £500 and £1600) then respectively "remaining charged thereon," of £300 to one daughter, and of £700 and £2900 to the other daughter, together making the £3900 in lieu of the like sum charged by the second deed. By this third deed trusts of the term are declared for raising the sums amounting to £3900, subject and without prejudice to the trusts declared by the previous deeds for raising the £500 and £1600, and a power of revocation and new appointment was reserved but confined to the £2900. But this third deed contained a direction to the effect that all the sums raiseable

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under the trusts of the term under the three deeds should be charged and chargeable on the property *pari passu* and without prejudice or priority. So far as concerns the intention of the donee of the power, I think that this express and particular direction was sufficient to counteract the effect of the earlier part of the deed, which appears to make the trusts for raising the £3900 subject to the trusts for raising the £1600 as well as the £500. It is clear that it was not competent for the donee of the power to insert any provision directly or indirectly revoking the charge of the £1600. The third deed does not purport to do anything of the kind. At the time when it was executed, the £1600 and the £3900, the two component parts of the £5500, stood on terms of equality, and the effect of the declaration in that deed as to the charges ranking *pari passu* was simply to maintain the equality then subsisting. The rule, then, as to successive independent deeds is not, in my opinion, applicable. The declaration as to all the charges ranking *pari passu* cannot affect the £500 which already had priority. No question of election has been suggested at the bar. If counsel desire I will allow the question to be argued. Subject to any question as to election the £500 has priority, and the several sums amounting to £5500 will stand as subsequent to the £500, but rank, *inter se*, *pari passu*.

Solicitors: *Kennedy, Hughes, & Kennedy; Lane, Fagge, & Andrews.*

F. G. A. W.

In re BARBER.
BURGESS *v.* VINNICOME.

CHITTY, J.
1886
Jan. 18.

[1885 B. 377.]

Will—Charge of Debts—Gift to Attesting Witness—Wills Act (1 *Vict. c.* 26), *s.* 15 [*Revised Ed. Statutes, vol. viii., p.* 33]—*Rules of Supreme Court*, 1883, *Order* LV., *r.* 2, *sub-r.* 16—*Costs.*

A., being entitled to a life interest in a fund over which she had a testamentary power of appointment, borrowed, in 1871, from *B.* £350 on the security of a covenant that £1250 should be paid one month after her death. She died in 1884, having by her will appointed executors, and directed payment of her debts, and also that *C.*, one of her executors (a solicitor), should be entitled to charge and receive payment for all professional business to be done by him under the will. *C.* was one of the attesting witnesses.

In an administration action by *B.* on behalf of himself and all other creditors, the estate being insolvent:—

Held, 1, that the executors could not be deprived of the costs out of the assets of a cross-examination for the purpose of investigating *B.*'s claim, though no proceedings to set aside the deed were subsequently taken.

2. That *C.*, as an attesting witness, was prohibited by the *Wills Act*, s. 15, from receiving that which was not a debt of which payment could be enforced at law, but a beneficial gift, which could only be claimed by virtue of the direction in the will; and (*semble*) that even if he had not attested the will the direction authorizing him to charge for his professional services operated by way of bounty only, and, the estate being insolvent, could not take effect as against the creditors.

Although applications for an order on further consideration are by Rules of the Supreme Court, 1883, Order LV., r. 2, sub-r. 16, where the estate is insolvent, business to be disposed of in Chambers, a plaintiff will not be disallowed his costs of further consideration in Court where the distribution of the insolvent estate gives rise to questions of difficulty.

FURTHER CONSIDERATION.

The action was brought by the Plaintiff, *A. L. Burgess*, on behalf of himself and all other the unsatisfied creditors of *Lydia A. Barber*, who died in November, 1884, for an administration of her estate; and on the 27th of February, 1885, upon application under Order XV., rule 1, the Plaintiff obtained judgment, whereby the usual accounts and inquiries and administration were directed.

The Plaintiff's claim against the estate was for a sum of £1250,

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which arose under a deed of 1871, whereby the testatrix, in consideration of an advance to her by the Plaintiff of £350, covenanted with him for payment to him of the sum of £1250 one month after her death, and also to exercise in his favour the power of appointment hereinafter mentioned.

At the date of this transaction Mrs. *Barber* was possessed of an annuity, with a general power under a settlement of February, 1829, of appointment by will over a fund, now represented by a sum of £1338 18*s.* 1*d.* Consols, which had been paid into Court by the receiver, and a sum of £19 8*s.* 3*d.* cash.

By her will dated the 27th of November, 1882, Mrs. *Barber* appointed *H. R. Harmer*, a solicitor, and her daughter, Mrs. *Vinnicome*, executor and executrix of her will, and gave, devised, and bequeathed to them all her real and personal property upon trust to call in and convert into money, and divide the proceeds after payment of her just debts and her funeral and testamentary expenses between her two daughters, Mrs. *Vinnicome* and Mrs. *Jickels*, in equal shares. And the testatrix declared that "the said *H. R. Harmer* shall be entitled to charge and to receive payment for all professional business to be done by him under this my will in the same manner as he might have done had he not been an executor."

Harmer was one of the attesting witnesses to the will.

On the 21st of January, 1885, probate of the will was granted to the Defendant, Mrs. *Vinnicome*, as one of the executors in the will named, power being reserved to *Harmer*, and on the 11th of November, 1885, probate was granted to *Harmer* pursuant to the power reserved to him. On the 28th of November, 1885, an order to carry on and prosecute the action against the Defendant and *Harmer* as legal personal representatives of the testatrix was obtained by the Plaintiff.

Harmer had obtained an order at Chambers for the cross-examination of the Plaintiff, and afterwards applied for leave to bring an action for the purpose of setting aside the Plaintiff's judgment for £1250. This application was, however, refused by the Chief Clerk.

It appeared by the certificate that the estate consisted of a sum of £1338 18*s.* 1*d.*, and £19 8*s.* 3*d.* cash in Court, and that the

debts amounted to £1348 19*s.* 9*d.*, including the Plaintiff's debt of £1250, and £10 10*s.* interest thereon.

The action now came on upon further consideration, and two questions arose:

1. Whether *Harmer* was entitled to charge for his professional services as solicitor to the estate?

2. Whether *Harmer* was liable to pay the costs of the Plaintiff's cross-examination?

Farwell, for the Plaintiff:—

1. The Defendant is not entitled to payment of a sum of £53 claimed in respect of his professional services as a solicitor to the estate. The estate being insolvent, he cannot, as against creditors, make any claim except for his actual costs as executor out of pocket; and also, as an attesting witness, he is prohibited by sect. 15 of the *Wills Act* from receiving the bounty of the testatrix in the shape of profit costs, this being a benefit which can only be claimed by virtue of the direction for payment contained in the will.

2. The Defendant must pay the costs of cross-examining the Plaintiff, as it was a purely vexatious proceeding, in unjustifiable opposition to the Plaintiff's claim, and in the result afforded no ground whatever for taking proceedings to set aside the Plaintiff's deed. If these costs are ordered to be paid out of the estate, which is insolvent, the result will be that the Plaintiff, who has succeeded in establishing his claim, will lose a portion of what has been found to be due to him.

F. Hoare Colt, for the Defendant *Harmer*:—

1. The Defendant must be allowed the costs of the cross-examination of the Plaintiff, which was not vexatious but properly taken; it being the duty of the executor to cross-examine the creditors in order to enable him to ascertain whether it may be advisable to take proceedings to set aside the security: *Leuton* v. *Brudenell* (1).

2. The direction that the solicitor may charge for his professional services is not a beneficial devise, legacy, or appointment,

(1) 12 W. R. 1127.

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within the meaning of the *Wills Act*, s. 15. The rule that a trustee or executor cannot charge profit costs, or for his professional services, applies in the case of a trustee or executor only, and not to a solicitor, whose costs are a debt due from the estate and consequently within the exception contained in sect. 15.

In this case *Harmer*, as soon as he had proved, employed his partner *Ruddock* to act for him, and do the work of solicitor in reference to the estate.

The Plaintiff was not justified in bringing on in Court the further consideration of this cause, which, where the estate to be distributed is insolvent, by Rules of the Supreme Court, 1883, Order LV., r. 2, sub-r. 16, is business to be disposed of in Chambers, and he must pay the extra costs thereby occasioned.

Farwell, in reply, submitted upon the last point that this was a proper case for bringing the matter on in Court rather than in Chambers, and that the Court had ample discretion notwithstanding Order LV., r. 2, sub-r. 16: *In re Bethlehem and Bridewell Hospitals* (1).

CHITTY, J.:—

The first point I have to decide is with reference to the cross-examination of the Plaintiff, which took place under these circumstances. The Plaintiff sues as creditor on behalf of himself and all other creditors, and he produced his deed shewing a claim against the estate for £1250 in respect of an advance of only £350, a very striking deed, and he is suing here, not on behalf of himself only, but on behalf of all the other creditors. It seems to me that the executor was entitled to make some inquiry into the circumstances in order to see whether there was any ground for attempting to set aside the deed, and the best mode of doing that was by cross-examination. But it is said that, as the estate is insolvent, if I accede to the proposition that the executor should not personally pay the costs of the cross-examination, I shall be making the Plaintiff pay the costs himself by diminishing the dividend he receives. That is a mistake. It may be the result, but the true way of looking at the case is that the executor

(1) 30 Ch. D. 541.

is entitled to his costs properly incurred in the administration of the estate, and what I have to consider is whether this was such a vexatious proceeding on the part of the executor as to justify me in depriving him of his costs out of the estate. I think the circumstances were such as to justify him in cross-examining the Plaintiff with a view to protect, not the executor himself, but the other creditors; because the other creditors are really substantial parties to the action, and it was to their interest to have this claim investigated. I think that what fell from Sir *John Romilly* in *Leuton* v. *Brudenell* (1) was very good sense, and that I ought not to make the executor pay the costs of the investigation and cross-examination, but to treat it as part of his costs properly incurred in the administration. In the result the executor has shewn no case whatever for setting aside the deed, but the difference between the two sums was very striking, and the Plaintiff has recovered a considerable sum beyond the actuarial estimate. That disposes of that point in favour of the executor.

The next point is this. The testatrix had a power of appointment which she has exercised by a mere gift of her personal estate. She has appointed executors. Upon that the law is plain. The property, the subject of this general power of appointment, is assets in the hands of the executor. For the payment of the debts the executor is sometimes called a trustee for the creditors, but that is not sufficient. He holds the assets and he is bound to pay. There is just a slight exception to that proposition in this case. If there had been no will appointing an executor and giving all the personal estate to him, there would have been no exercise of the power which now brings into the assets the property which would not otherwise be liable for the payment of the debts. The direction in the will is that after the payment of the debts, the whole of the testatrix's estate, which includes the sum appointed, is to go to the persons mentioned in the will. It seems to me that if the executor came forward on taking the account and demanded personal remuneration for his services, he must not be paid. It is clearly the rule of Equity, and I believe it is the rule of Law, but whether it is the rule of Law or not is immaterial since the *Judicature Acts*, because when there is any conflict the rules

(1) 12 W. R. 1127.

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of Equity prevail. It is clear, the matter standing in the position I have stated, that the executor could not have charged for his personal services. But, says the executor, there is a clause in the will which enables me to do it. What is that? It is bounty. It must be a gift to the executor out of the assets of the testatrix which enables him to take that which the law does not allow. I cannot conceive that the case can be put on any other footing. Apart from the *Wills Act* it appears to me the executor could not have claimed under the will anything as against the creditors in respect of his personal services; he could not have got "profit costs." But however this may be, the case does not rest there. The executor himself attested the will, and by sect. 15 of the *Wills Act* it is enacted that "if any person shall attest the execution of any will, to whom . . . any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall . . . be utterly null and void."

It appears to me clear that this is in effect bounty on the part of the testatrix, that it is covered by the section and is void. It is an interest, legacy, gift, or appointment which operates by way of bounty, and I think the construction of the section is perfectly clear, and that the exception of any debt or debts, so far from being favourable to Mr. *Colt's* argument, shews the contrary. The only thing apparently excepted is that to which the law gives the right, viz., debts, payment of which can be enforced apart from the provisions of the will. I must therefore insert a declaration in favour of the Plaintiff in regard to this claim which has been made by the solicitor-executor under the particular clause.

It was said that it was obligatory on the Plaintiff to bring this matter on in Chambers for further consideration according to Order LV., r. 2, sub-r. 16. But the answer is plain, because the costs have not been increased by this at all. A case of this kind could not have been argued before the Chief Clerk; it must have been brought before me, and the probability is, seeing the way in which it has been argued, that if the Plaintiff had first brought it into Chambers, it must have come before me in Court;

it being one of the matters which my Chief Clerks do not undertake to decide. The Plaintiff has adopted a proceeding less expensive, and I shall not think of depriving him of his costs for that reason. It is rather meritorious.

MINUTE OF ORDER:—Declare that the Defendant, *H. R. Harmer*, is not entitled to claim payment of profit costs by virtue of the declaration in the testatrix's will contained, he being one of the witnesses thereto, but this declaration is without prejudice to any of his rights apart from the clause in the will; And it appearing that the estate of the testatrix is insufficient for the payment of her debts and the costs of this action, let it be referred to the Taxing Master to tax the costs of the Plaintiff and the Defendants of this action as between solicitor and client, including the costs of the cross-examination of the Plaintiff and *F. W. Finier*, and including in the costs of the Defendants any costs, charges and expenses properly incurred by them in the administration of the testatrix's estate beyond their costs of this action.

Solicitors: *Pritchard, Englefield, & Co.*; *Aldridge, Thorn, & Morris*, agents for *Harmer & Ruddock, Great Yarmouth.*

F. G. A. W.

In re COUSINS.

[1885 W. 526.]

Mortgage—Priority—Notice—Solicitor—Conveyancing Act, 1882 (45 & 46 *Vict. c.* 39), *s.* 3, *sub-s.* 1, *cl.* 2.

In June, 1875, *A.* mortgaged his share of trust property to *E.* by deed, which did not disclose any prior charge, and contained the usual covenant by *A.* that he was entitled to assign free from incumbrances.

Notice of this mortgage and of a further charge created in May, 1877, was served on behalf of *E.* on the trustees of the property in November, 1881.

A.'s share was subject to a prior mortgage to *B.*, a solicitor, who was paid off in 1873, when a fresh mortgage was executed to *C.*, which in July, 1874, was transferred by *C.* to *D.* (with a further charge in February, 1881).

B. was solicitor for the trustees and *A.* the mortgagor, and had acted as solicitor for *C.* and *D.* in the mortgage transactions of 1873 and 1874, and also as solicitor for *E.* in the mortgage transaction of June, 1875. The trustees had not received notice of any charge before receiving notice of *E.*'s mortgage in November, 1881.

Held, having regard to s. 3, sub-s. 1, cl. 2, of the *Conveyancing Act*, 1882, that *E.*'s charge, of which notice was first given, was entitled to priority, as his mortgage deed shewed a title in *A.* free from incumbrances; and that

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as the Court declined to infer that *B.* had any recollection, or that inquiries made by him when acting as solicitor for *E.* in the transaction would have elicited from *A.* the existence of any prior incumbrance, it could not be said that although *B.* had acted as solicitor for the parties in the previous mortgage transactions, notice of any prior charge affecting the property had come to his knowledge as the solicitor of *E.* in the mortgage transaction of June, 1875.

ADJOURNED SUMMONS.

In 1871, *Matthew Cousins*, being entitled under the will of *William Cousins* to a share in the proceeds of real and personal estate, mortgaged by deed of the 21st of August, 1871, his share to his solicitor *William Banks* (who was also the solicitor for the trustees and executors under the will), to secure the repayment of £35. The title deeds and papers relating to the trust estate were in the custody of *William Banks*, who, as he alleged, prepared a notice of the above mortgage, and placed the same in the trust box then in his possession, but this notice had not been found.

In December, 1873, *Matthew Cousins* applied to *Banks* for a further advance of £150, and *Banks*, acting as his solicitor, procured the advance from *William Richardson*. *Banks* was paid off by *Richardson*, and was a party to a mortgage of the 8th of December, 1873, by *M. Cousins* of his share to *Richardson* for securing repayment of the £150. A notice of this mortgage was alleged by *Banks* to have been prepared by him at the time and placed in the trust box, but this notice also had not been found. In this transaction *Banks* acted professionally for all parties interested therein, and still continued to act as solicitor for the trustees.

On the 29th of July, 1874, *Richardson* transferred his mortgage to *William Drake*, but no notice of that mortgage was given to the trustees, as *Banks* (who prepared the deed of assignment for both parties, and was acting as solicitor for the trustees and also for *Drake*) considered that being only an assignment of an existing mortgage (of which notice had already been given) it was unnecessary to give notice thereof.

By deed of the 18th of June, 1875, *Matthew Cousins* mortgaged his share to *Dennis Pepper* to secure repayment of £500, and in May, 1877, made a further charge on the share of £50. Neither

of these deeds contained any mention of the previous charge of £150, and there was the usual covenant that *Cousins* had good right to assign free from incumbrances. *Banks* acted as solicitor on behalf of *Cousins*, and also on behalf of *Pepper* in these transactions. Both the mortgage and the further charge were registered in the *Yorkshire* Registry, but notice thereof was not given by *Banks* to the trustees.

Dennis Pepper died in March, 1878, and *Matthew Cousins* on the 9th of March, 1881.

On the 1st of November, 1881, notice in writing of the mortgage and further charge in favour of *Pepper* was served by his executors upon *Hartley*, the surviving trustee of *William Cousins'* will; and *Hartley* deposed that until the receipt of that notice he never received any notice of any assignment by *Matthew Cousins* of his share or of any charge thereon in favour of any person whatsoever, and that he believed that his co-trustee, who died in June, 1874, never received any such notice.

The share of *William Cousins* having been paid into Court under the *Trustee Relief Act*, this summons was taken out by *Drake* for payment out of the funds in Court of the amount due to him for principal, interest, and costs in priority to the charges of *Pepper's* executors.

Romer, Q.C., and *Wiglesworth*, in support of *Drake's* claim:—

We are entitled to priority, as *Pepper* was clearly affected with notice of our prior charge through *Banks*, who was engaged as solicitor for all the parties in these mortgage transactions, and must of necessity have had knowledge of *Richardson's* prior charge. Notice to a solicitor of a transaction, and about a matter as to which it was part of his duty to inform himself, is actual notice to the client, unless there has been fraud on the part of the solicitor, so as to make concealment of the facts from his client necessary: *Rolland* v. *Hart* (1); *Calisher* v. *Forbes* (2); *Fisher* on Mortgages (3).

Ince, Q.C., and *H. M. Humphry*, for *Pepper's* executors:—

Prior notice to the trustee of the fund gives us, as purchasers

(1) Law Rep. 6 Ch. 678. (2) Law Rep. 7 Ch. 109.
(3) 4th Ed. pp. 528, 619.

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for value without notice, priority, unless it can be shewn that *Banks* acquired notice of *Richardson's* prior charge while acting as solicitor for *Pepper* in the mortgage transaction of June, 1875. Even before the *Conveyancing Act*, 1882, it has been held that information acquired by a solicitor in one transaction cannot affect through the doctrine of imputed notice his principal in a subsequent transaction: *Mountford* v. *Scott* (1); and now by the *Conveyancing Act*, 1882, s. 3, sub-s. 1, cl. 2, which was passed in order to restrict the doctrine of constructive notice, it is provided that in order prejudicially to affect a purchaser with notice it must be "in the same transaction with respect to which a question of notice to the purchaser arises," that it has "come to the knowledge of his solicitor or other agent as such." Whatever knowledge, therefore, may have been acquired by *Banks* in the previous dealings with the property is immaterial so far as *Pepper* is concerned, unless such knowledge is brought home to *Banks* as solicitor for *Pepper* in the transaction of June, 1875.

[They also referred to *Patman* v. *Harland* (2).]

Romer, in reply:—

Pepper as *puisne* incumbrancer, by employing *Banks*, who was employed both for the mortgagor and for the prior incumbrancers, is necessarily affected with notice of the prior transactions affecting the property: *Fuller* v. *Benett* (3).

CHITTY, J.:—

The question is one of priority. The executors of *Pepper* were the first to give notice to the trustees of a charge upon the fund, and *primâ facie* by giving that first notice they have got priority. The question which arises relates to notice as between the incumbrancers *inter se*, and it has been contended that when the testator (*Pepper*) took his mortgage or charge in June, 1875, he had notice of the prior charge which is now vested in *Drake*. Now it is clear that *Pepper* himself knew nothing about it, but it is sought to affect him with notice through his solicitor *Banks*. *Banks* had been engaged in previous transactions as solicitor for

(1) 3 Madd. 34; T. & R. 274. (2) 17 Ch. D. 353.
(3) 2 Hare, 394, 405.

Richardson, who took the charge which was transferred to *Drake* in 1874, that is before *Pepper* took his charge, and on that occasion *Banks* had acted also for the mortgagor, and also, as it appears, for the trustees. Mr. *Banks* appears to have thought that he had discharged his duty by preparing a notice in regard to the incumbrance, and putting it in the box containing the trust papers which was in his custody, intending thereby to give notice to the trustees of the charge. It was not argued that this was effectual notice to the trustees, because notice must be brought home to them, and, as was said by Sir *J. Romilly*, M.R., in one of the numerous cases with regard to officers' commissions (1), a notice must be effectual for all purposes to give priority and to bind the person who acts, if he does act unfortunately, afterwards without regard to the notice. Now it is quite plain that the trustees were not affected with notice of *Drake's* charge or of *Drake's* transferor's charge within the doctrine of the Court as to notice. Afterwards in the transaction of June, 1875, *Banks* acted as solicitor for *Pepper*, and also for *Cousins* the mortgagor, and Mr. *Banks* has made an affidavit, and there has been an agreed statement of facts, but what Mr. *Banks* did upon that occasion is left altogether in the dark. He was called on behalf of *Drake*, but he has not thought fit to tell me what was done. Now this I know did occur. I have the mortgage deed to *Pepper*, which recites the title, shewing *Cousins* to have an interest which he was capable of charging; and after properly charging that interest by way of mortgage I find a covenant on his part that he is entitled to assign free from incumbrances. There is no notice of course on the face of the deed of the prior charges. *Banks*, though a witness, gives no information on the subject. What inference then am I to draw? I must assume that *Banks* was an honest gentleman, and an honest solicitor, and that he would not have allowed his client to execute such a deed as that if he had borne in mind the fact, of which at one time it is clear he had knowledge, that there was a prior incumbrance. What ought I to say with regard to the inquiries he made? Did *Banks* ask for an abstract of title or have one? I act on the principle *omnia præsumuntur rite esse acta*. I must consider he

(1) See *Somerset* v. *Cox*, 33 Beav. 634.

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had, and not merely on that presumption, but because I find the title recited on the face of *Pepper's* mortgage, omitting the instrument of prior charge, which gave rise to the question. Then am I to assume without any evidence at all that *Banks* went to *Cousins* and asked him questions, and that *Cousins* answered him that there was some other incumbrance on the property? I think not. I have no right to draw that inference as against Mr. *Banks*. I then come to sect. 3 of the *Conveyancing Act*, 1882, which was clearly intended for the protection of purchasers to some extent —the question is to what extent—against that refined doctrine of imputed notice which had been found to work very grievous injustice to honest men, the notice being implied in a very refined manner, and brought home to a man who knew nothing about the matter, and who found that though he had acted perfectly honestly he was postponed by reason of the doctrine of the Court. His Lordship after reading the section, and observing that in the first part "notice" was used in the strict legal sense, said with respect to (i.): It did not come within his (*Pepper's*) knowledge, and it is not suggested that it would have come to his knowledge if he had made such inquiries and inspections as are mentioned in that first sub-section. Then the argument really turns on (ii.). I have no doubt that the words "as such" which occur, both with regard to his counsel and his solicitor equally, were like the word "knowledge" used advisedly, and have a meaning. The meaning is "come to the knowledge of the solicitor in the transaction as solicitor for the purchaser" (which of course includes mortgagee) "or would have come to the knowledge of his solicitor or other agent as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent." Now that section was intended to remedy what was considered to be the evil consequences of such a doctrine, as was well illustrated by *Hargreaves* v. *Rothewell* (1). A solicitor is employed who has had a considerable number of other transactions, and amongst them he has had a dealing with the particular estate which is under sale. He may or may not have a good memory, but according to the doctrine of that case notice was imputed to the client if there was such a distance only between the

(1) 1 Keen, 154, 160.

former transaction and the present transaction in which he was engaged as left the Court under the impression—it could not be much more than an impression—that the solicitor had actually remembered the former transaction; and in that way knowledge was imputed to the solicitor, and then through the solicitor notice was imputed to the client. That was too refined, and it is quite plain that the section put an end to that doctrine altogether, and I think, as far as this case is concerned, it has put an end to that suggestion which has been made that as *Banks* was acting for the mortgagor also, and might be presumed to know what his client the mortgagor knew, notice of such knowledge must be imputed through him again to his other client the mortgagee. That suggestion I think cannot stand; the words of this section are, I think, sufficiently clear. There must be something which comes to the knowledge of the solicitor as such, and in the transaction. The words "come to his knowledge" are not unimportant, and seem to me to afford the true answer to the argument that *Banks* had knowledge because he formerly knew. The section says "come to the knowledge," and I cannot impute to him that the knowledge had come to him in this transaction because he knew it on the former occasion. To do that would be to destroy the section. Every word of it requires careful weighing, and the result is, 1, that it must be in the same transaction; 2, the matter must come to his knowledge, and 3, must come to the knowledge of the solicitor as such, viz., as solicitor for the mortgagee. Now, I am of opinion that there is no ground for saying that it did come to the knowledge of Mr. *Banks* in this transaction within the meaning of the first part of this sub-section, and I so hold. Then it is said that it would have come to the knowledge of *Banks*, the solicitor for *Pepper* as such solicitor, if he had made the inquiries and inspections which he ought to have made. I think the solicitor is bound, as acting for a mortgagee, in a case such as that now before me, to ask what the title is, and to get some answer either in the shape of an abstract, or in the shape of a copy of the will and a statement of any additional facts required to shew the title of the legatee who proposes to execute the mortgage. In some cases that is all that is necessary. In this case I cannot say that the prior incumbrance would have come to the

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knowledge of *Banks* if he had gone to *Cousins*. *Banks* has not told me anything about it, nor has *Cousins*. But I do know this, that *Cousins* has actually executed the deed to *Pepper*, which on the face of it not only does not mention the prior mortgage, but is so framed as to shew that there was no prior incumbrance; and, therefore, if *Banks*, not having, as I say he had not on the evidence, knowledge of the prior deed, had gone to *Cousins* and asked him, I ought not to infer that *Cousins* would have said that there was a prior incumbrance, but rather to infer that *Cousins* would have answered according to the statements that appear on his own deed. The executors of *Pepper* therefore have priority in respect of the £500 mortgage, and further charge of £50.

Solicitors: *Ridsdale & Son*, agents for *Weddall, Parker, & Parker, Selby; Torr, Janeway, & Co.*

F. G. A. W.

SERFF *v.* ACTON LOCAL BOARD.

PEARSON, J.

1886

Jan. 27, 28.

[1885 S. 4035.]

Easement—Way of Necessity—Land taken compulsorily—Public Undertaking.

A. and *B.* had respectively acquired interests under building agreements in two adjoining plots of land. A local board under their compulsory powers took half an acre, part of *A.'s* holding, and five acres, part of *B.'s* holding, for the purpose of sewage works, the necessary proceedings having been taken as against *A.* and *B.* in respect of their several interests, and against the reversioner *C.* in respect of the whole five and a half acres. The only way to the land taken was a warple way over other part of *A.'s* building plot, which, for thirty years before the building agreements, had been used by the occupiers of both *A.'s* and *B.'s* land for purposes of cultivation, and since the building agreements had been used by *A.* for his own building purposes :—

Held, that the local board had a right of way over the warple way for all necessary purposes in connection with the sewage works.

THE *Acton* Local Board required, for the purpose of sewage works authorized by a *Provisional Order Confirmation Act* passed in 1881, a certain piece of land, at the back of what was then building land, on the south side of *Uxbridge Road, Acton.* The whole land required was 5A. 1R. 35P. in extent; 1R. 32P., part of the land required, was included in a building agreement made in 1880, under which *Frederick William Serff*, the Plaintiff in the action, held a large plot of land abutting north on the *Uxbridge Road.* The rest of the land required by the *Acton* Local Board was included in a building agreement, also made in 1880 by the same freeholder, under which one *Scott* held another large plot adjoining the Plaintiff's building land on the east, with a frontage on the north to the *Uxbridge Road. Thomas C. Cowper Essex* was tenant for life of a settled estate which comprised the plots held by the Plaintiff and *Scott.* The local board acquired the interests of *Scott*, the Plaintiff, and the reversioners in the whole land they required under their compulsory powers. The transaction with *Scott* was completed first by a conveyance from him. The Plaintiff and his mortgagees assigned their interest by a deed dated the 22nd of May, 1885, and the reversion was subsequently conveyed to the local board. There was an old way

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or track, formerly known as a warple way, leading from the *Uxbridge Road:* it was about ten feet wide and was not metalled. The way passed entirely over the Plaintiff's land up to a point on the boundary of the five acre piece which the board acquired from *Scott*, and from that point the way continued over other parts of *Scott's* building land. For thirty years prior to the building agreements the warple way had been used by tenants of the settled estate who occupied the land taken by the board and other adjoining land. The tenants used the land for market-gardens, and the only use of the way was for the purposes of cultivation. Since 1880 the way was used by the Plaintiff for carting bricks made on the land in his occupation. There was no other way formed or in use to the land acquired by the board, and no possibility of reaching that land except by passing over the Plaintiff's or *Scott's* building land. Messrs. *Nowel* and *Robson*, Defendants to the action, had contracted with the board to erect sewage works on the land so acquired by them. The contractors were using the warple way to carry bricks and other material necessary in constructing the works. The Plaintiff claimed an injunction to restrain the Defendants from so using the road and damages for trespass.

The assignment by the Plaintiff and his mortgagees to the local board contained the following recital: "And whereas under or by virtue of the provisional order in that behalf, made by the Local Government Board dated the 9th day of May, 1881, and the *Local Government Board Provisional Orders Confirmation (Acton, &c.) Act*, 1881, confirming the said provisional order, and under and by virtue of the *Lands Clauses Consolidation Act*, 1845, and the several other statutes and authorities therein and thereunto enabling, the said local board was and is empowered to take and purchase for the purpose of certain works authorized by the said provisional order, and the Act confirming the same, the land and hereditaments hereinafter mentioned and described, and have agreed to purchase the interest of the said *Frederick William Serff* and his mortgagees therein under or by virtue of the hereinbefore recited agreement of the 29th day of April, 1880, or otherwise, at the price of £750, which sum is to include and be in full compensation for all damage sustained or to be sustained or

otherwise legally recoverable by the said *Frederick William Serff* and all persons claiming under him by reason of the execution of the works of the said board or by injuriously affecting the adjoining or other land under their powers in that behalf, and for which sum the said *Frederick William Serff* has by arrangement or compromise obtained a verdict and judgment in an action which came on for hearing before Mr. Justice *Denman* and a special jury on the 5th of May, 1885, being an action brought against the said local board by the said *Frederick William Serff* upon the award in writing dated the 16th of January, 1884, of *George Pownall*, who had been duly appointed as umpire between *Hyam Henry Collins* and *Robert Vigers*, who had been duly nominated by the said *Frederick William Serff* and the said local board respectively as arbitrators for deciding the purchase-money and compensation to be paid by the said local board for the aforesaid purchase, and for damages sustained and to be sustained as aforesaid pursuant to the provision in that behalf contained in the *Lands Clauses Consolidation Act*, 1845."

The conveyance by *Scott* and the freeholder contained similar recitals *mutatis mutandis*.

Crispe, and *Lawrence C. Jackson*, for the Plaintiff:—

The board being a public body and taking the land by compulsion, no right of way passed to them unless it was actually assigned in the conveyance to them in so many words. If it is to be held that any right of way passed to the board, either as a way of necessity or as a way actually used before the date of the conveyance, that right is limited to the agricultural purposes for which the way was formerly used in connection with the land: *Corporation of London* v. *Riggs* (1). If the board are entitled to a way of necessity it must be over *Scott's* land.

W. W. Karslake, Q.C., and *Pollard*, for the *Acton* Local Board, and *MacSwinney*, for the Defendants *Nowel* and *Robson*:—

This right of way for bricks and heavy materials passed under the *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 6; in the second place, the board are entitled to use it

(1) 13 Ch. D. 798.

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as a way of necessity, not for the purposes it may formerly have been used for, but for the purposes for which it was conveyed: *Bayley* v. *Great Western Railway Company* (1); *Corporation of London* v. *Riggs* (2). The vendors had notice of what the land was required for: *Davies* v. *Sear* (3), and they were paid for all damage to be caused by the use of the way for the purpose of the sewage works.

Lawrence C. Jackson, in reply.

PEARSON, J.:—

The land taken had ceased to be agricultural land at the time the local board served their notice to treat, and I can have no doubt that before the arbitrators and umpire the land was valued not simply as agricultural land, but as building land; and it is not immaterial to remark that in the valuation under the Act compensation not only for present, but also for future damage is to be awarded: and it was perfectly open to *Serff*, and I must assume that he did not forget to avail himself of the privilege, to lay before the arbitrators the injury that would be done both by the construction and the presence of the sewage works, and that he received compensation for all present and future damage, having regard to the purposes for which the land was to be used. In the conveyance by the tenants and the freeholder there are recitals stating what the local board were about to do, and the purposes for which they took the land. Everything is stated shewing that the parties with whom they were dealing were perfectly aware of what the board were about to do with the land. Under those circumstances, the freeholder and tenants convey to the local board, in the ordinary way, in terms which would give the purchasers the right to all ways appurtenant to or used with the land sold. By common consent this way in question had been used for all agricultural purposes for thirty years. The land was now sold for a particular purpose. The question is whether the use of this land which passed by the conveyance, is not one which authorizes the board to cart down it bricks and all materials necessary for the sewage works.

(1) 26 Ch. D. 434. (2) 13 Ch. D. 798. (3) Law Rep. 7 Eq. 427.

Now the law in respect of these rights of way of necessity is not as definite as might be desired; it has been from time to time subject to litigation and the decision of the Courts. It came before the Court in the old case of *Ballard* v. *Dyson* (1), on the question, whether or not a short road, a *cul de sac* in fact, over which there was no doubt a right to drive carts, could be used for the purpose of driving cattle. The case came before a Court composed of Lord Chief Justice *Mansfield* and Justices *Heath*, *Lawrence*, and *Chambre*. It was a decision given at considerable length. The Lord Chief Justice says (2): "In general a public highway is open to cattle, though it may be so unfrequented that no one has seen an instance of their going there; but the presumption would be for cattle as well as carriages, otherwise cattle could not be driven from one part of the kingdom to another. The authority cited from *Hawkins* only refers to *Co. Litt.*, and the passage in *Co. Litt.* does not prove that Lord *Coke* was of opinion that in the case of a private way, which must originate in a grant, of which, the grant itself being lost, usage alone indicates the extent; evidence of a limited user could not be received to restrict the usual import of the grant." And then, after a few more observations, he says: "I have always considered it as a matter of evidence, and a proper question for a jury, to find whether a right of way for cattle is to be presumed from the usage proved of a cartway. Consequently, although in certain cases a general way for carriages may be good evidence, from which a jury may infer a right of this kind, yet it is only evidence; and they are to compare the reasons which they have for forming an opinion on either side. As well at the trial, as since, I have thought that there might often be good reasons why a man should grant a right of carriage-way, and yet no way for cattle. That would be the case where a person who lived next to a mews in *London* should let a part of his own stable, with a right of carriage-way to it, which could be used with very little, if any, inconvenience to himself; yet there it would be a monstrous inference to conclude that, if a butcher could establish a slaughter-house at the inner end of the mews, without being indictable for a nuisance, he might therefore drive horned cattle to it, which would be an intolerable annoyance to the grantor. So cases may exist of a grant

(1) 1 Taunt. 279. (2) 1 Taunt. 283.

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of land, where, from the nature of the premises, permission may be given to drive a cart to bring corn or the like, and that right might be exercised without any inconvenience to the grantor; but it does not follow that cattle may be driven there." There is only one other case to which I need refer, that of *Gayford* v. *Moffatt* (1), before Lord *Cairns:* it was a case in which a lessor had demised premises for the business of a wine and spirit merchant, giving the lessee a right of way through a passage. And the question was how far the right of way extended, and to what extent the lessor would be restrained from interfering with that right of way. Lord *Cairns* says (2): "As to the general question of a grant of right of way, the termor, or the freeholder, of two closes has demised one of them to a tenant. The tenant cannot get at that close from a public highway, or street, without crossing the other close. The case, therefore, is exactly that described by Mr. Serjeant *Williams* in his note to the well-known case of *Pomfret* v. *Ricroft* (3): 'So where a man having a close surrounded with his own land grants the close to another in fee, for life, or years, the grantee shall have a way to the close over the grantor's land as incident to the grant; for without it he cannot derive any benefit from the grant.' 'This principle seems to be the foundation of that species of way which is usually called a way of necessity.' Now, that is exactly the interpretation of the words used in this grant, 'with all ways to the premises appertaining'; it means, with such a way as the law would hold to be necessarily appertaining to premises such as these—that is, a way of necessity; therefore, immediately after this lease was granted, this tenant occupying the inner close became entitled to a way of necessity through the outer close, and that way must be a way suitable to the business to be carried on on the premises demised, namely, the business of a wine and spirit merchant. That is the position in which the tenant stood after the lease was granted, and is the position in which he now stands."

The Lord Chancellor cited with approval that passage from Serjeant *Williams* in which Serjeant *Williams* makes no distinction between a grant in fee and a demise. It appears that that law must be applied in both cases; and that what I have to

(1) Law Rep. 4 Ch. 133. (2) Law Rep. 4 Ch. 135.
(3) 1 Wm. Saund. 321, n. 6.

determine, therefore, is when the right of way was granted, to what extent and for what purposes it was granted. And taking into consideration that the land was bought for a particular purpose, was sold for that particular purpose, and that the assignment of the Plaintiff's interest in the lands recited the payment of a sum of money, not only for the purchase, but also for all injury and damage that might accrue to him present and future, I come to the conclusion that the right of way was granted for all purposes for which it was required, or could be required, for sewage works. And I hold that in this case the *Acton* Local Board were entitled to use the way for the purpose for which they have used it, and the Plaintiff's case fails.

Solicitor for Plaintiff: *Edward Clarke.*
Solicitors for *Acton* Local Board: *Hemsley & Hemsley.*
Solicitors for Defendants *Nowel* and *Robson: Venn & Woodcock.*

D. P.

In re CAMPBELL'S TRUSTS.

Will—Construction—Gift to Children—Per Stirpes or per Capita.

A testator gave some houses to trustees, upon trust to receive the rents, and to pay the same in equal moieties to his son and his daughter during their lives; and, after the death of either of them without issue living, upon trust to pay the whole thereof to the survivor during the life of such survivor; but, if there should be issue living of the first of them so dying, then upon trust to pay one moiety to the survivor, and to divide the remaining moiety between all and every the child or children of the one so first dying; and, after the decease of the survivor of the son and daughter, on trust to sell the property and to divide the proceeds equally amongst all and every the child or children of each of them the testator's son and daughter who should attain twenty-one, in equal shares and proportions, to be paid at twenty-one:—

Held, that the proceeds of sale were divisible among the grandchildren *per stirpes* and not *per capita*.

Brett v. *Horton* (1) followed.

Nockolds v. *Locke* (2) explained and distinguished.

STEWART CAMPBELL, by his will, dated the 23rd of March, 1822, gave and bequeathed to trustees five houses in *King Street*,

(1) 4 Beav. 239. (2) 3 K. & J. 6.

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in the parish of *St. James's, Westminster*, upon trust to receive the rents thereof from time to time, and thereout to pay to his wife the sum of £30 per annum during her life, and as to the residue thereof to divide and pay the same in equal moieties to his son *John Campbell* and his daughter *Ann Frances Campbell* to and for their respective use and benefit, and, after the death of the testator's wife, upon trust to pay the same equally to his said children during the term of their lives; and, from and after the death of either of them without issue living, then upon trust to pay the whole thereof to the survivor during the life of such survivor, for his or her absolute use and benefit; but, if there should be issue living of the first of them so dying, then upon trust to pay one moiety unto the survivor, and to divide the remaining moiety between all and every the child or children of the one so first dying; and, from and after the decease of the survivor of them his said children, to make sale of the said trust premises and divide the purchase-money equally amongst all and every the child or children of each of them the said *John Campbell* and *Ann Frances Campbell* who should live to attain twenty-one years, in equal shares and proportions, to be paid and payable as and when such child or children should respectively attain twenty-one years. The testator died on the 24th of February, 1823.

Under the provisions of an Act passed in the 7th year of *George* IV. two of the houses were sold to the Commissioners of Woods and Forests, and the purchase-money was paid into Court. The testator's son *John Campbell* died on the 13th of October, 1878, having had eight children, all of whom attained twenty-one. The testator's daughter *Ann Frances Campbell* married *James Fleming*, and had one child only, a son, named *W. J. Fleming*, who attained twenty-one, and died on the 29th of October, 1885. After the death of *James Fleming*, *Ann Frances Fleming* married *H. Hill*. At the time of the presentation of the petition Mrs. *Hill* was eighty-two years of age. She had never had any other child.

The petition was presented by some of the children of *John Campbell*, some of their mortgagees, and Mr. and Mrs. *Hill*, for the division of a moiety of the fund in Court. The question

was whether the division was to be *per capita* or *per stirpes, i.e.,* whether the fund was divisible in ninths among the eight children of *John Campbell* and the one child of Mrs. *Hill;* or whether Mrs. *Hill's* child took a moiety, the other moiety being divisible in eighths among the eight children of *John Campbell.*

Methold, for the Petitioners:—

The fund ought to be divided among the children of the testator's son and daughter *per capita.* Upon any other construction of the will there could be no reason for postponing the division until the death of the survivor of the son and daughter: *Nockolds* v. *Locke* (1); *Abrey* v. *Newman* (2); *Smith* v. *Streatfield* (3); *Theobald* on Wills (4).

B. B. Rogers, for a Respondent in the same interest.

Kenyon Parker, for the representative of the deceased child of Mrs. *Hill:*—

The division ought to be *per stirpes.* The gift is not of money, which would be easily divisible at any time, but of houses, which must be sold in order to divide them, and that is the reason for postponing the division until the death of the survivor of the son and daughter. The houses were to be sold once for all then. *Brett* v. *Horton* (5) is very like the present case, and is an authority for a division *per stirpes.* The result of the other construction would be that, if the testator's daughter had died first, her son would have been entitled to receive half the income during the life of the testator's son, and on the death of the son his income would have been cut down to that produced by one-ninth of the principal. That would be a very improbable intention to attribute to the testator. The decision in *Nockolds* v. *Locke* was founded on the discretion given to the trustees as to the application of the income. Again, the word "equally" in the ultimate gift would be surplusage, if the division is to be *per capita.* The word "equally" points to a division of the proceeds of sale into two equal parts before it is divided among the grandchildren,

(1) 3 K. & J. 6.
(2) 16 Beav. 431.
(3) 1 Mer. 358.
(4) 3rd Ed. p. 240, § 3.
(5) 4 Beav. 239.

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and then each moiety is to be divided "in equal shares and proportions" among the grandchildren of each *stirps*.

Charles Church, for an incumbrancer.

Method, in reply, referred to *Pearce* v. *Edmeades* (1).

PEARSON, J.:—

I think I must accede to the very clear and forcible argument of Mr. *Kenyon Parker*. I was at first inclined to take the opposite view, but I think he has pointed out the true construction of the will. The testator intended to provide for his son and his daughter and their respective children. The property which he was disposing of was house property. That is a very material fact. If it had been personalty it would have been easily divisible at any time. But, it being house property, his intention was that his son and daughter should have the benefit of keeping it *in specie* and receiving the rents, and that no sale of the property should take place until after the death of the survivor of them. He gives to each of them a life interest in a moiety of the rents, and then he says that, if either of them shall die, leaving issue, one-half of the rents is to be paid to the survivor, and the other half to the children of the one who has died. That gives to those children half of the income of the property during the life of the survivor of the son and daughter. Up to this point there is a stirpital division of the income. Then the testator goes on to direct that after the death of the survivor of his son and daughter the property is to be sold, and the proceeds of sale divided "equally amongst all and every the child and children" of the son and daughter, who shall attain twenty-one, "in equal shares and proportions." The question is, did the testator intend that, after the death of the survivor of his son and daughter, an equal division should be made of the money among all his grandchildren, or did he intend that it should be divided amongst them *per stirpes?* I do not say that there would have been anything unreasonable in the former mode of division, and, if the words of the gift had been plain, the Court must have adhered to them.

(1) 3 Y. & C. Ex. 246.

But Mr. *Kenyon Parker* has pointed out that the word "equally" precedes the gift to the grandchildren, and that the gift is followed by the words "in equal shares and proportions." If, therefore, the word "equally" is to have any meaning at all, there must be an equal division before the gift to the grandchildren takes effect. If you substitute the words "in moieties" for the word "equally," I think you will arrive at the true construction, *i.e.*, that there is to be an equal division of the purchase-money in the first instance, and then an equal division of each moiety among the grandchildren of each *stirps* respectively. If the words had been "in moieties," instead of "equally," I do not think there could have been any doubt as to the meaning, and a division of the proceeds of sale *per stirpes* is more in accordance than a division *per capita* with the original stirpital division of the income.

I have been referred to two representative cases. One is *Nockolds* v. *Locke* (1), in which *Wood*, V.C., came to the conclusion that the division ought to be *per capita*. But there are two remarkable distinctions between that case and the present. There, the property was personalty—stocks and shares; here it is houses; and the word "equally" was not used in addition to the words "in equal shares and proportions." Moreover, the whole of the income which was given to a daughter of the testator for her life was not upon her death given to her children during the life of the longest liver of the daughters, upon whose death the division was to be made. The Vice-Chancellor founded the most important part of his judgment on this. He also noticed the argument of Mr. *Sweet*, that, "if the testator intended a division *per stirpes* of the capital, why did he postpone the division of the fund till the death of his surviving daughter?" The answer to that question in the present case would be, that the property was house property, and the testator intended that it should be kept *in specie* till the death of the survivor of his son and daughter.

The other case is *Brett* v. *Horton* (2). There Lord *Langdale*, M.R., said (3): "The testatrix . . . has directed that the income

(1) 3 K. & J. 6, 11.

(2) 4 Beav. 239.

(3) 4 Beav. 242.

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of the remaining property should be paid in equal fourth shares one fourth share to each of three persons distinctly named, and the other fourth to the mother of the children, in a way, which shews it was intended, through her, to be applied for the maintenance and care of the children until the youngest of them attained twenty-one. This was to continue until the youngest of them attained twenty-one, but then the property was to be sold and divided amongst the three persons named and the children, describing them as a class, their respective 'executors and administrators, in equal shares and proportions as tenants in common.' I cannot impute to this testatrix the intention of making a division when the youngest of those children attained twenty-one years different from that which she had previously made." I may adopt those very words in the present case, and say that, inasmuch as a moiety of the income is given to the children of that child of the testator who shall first die, during the life of his surviving child, I cannot think that the testator intended, when the property should be sold after the death of the survivor, to make a division different from that which he had previously made.

I hold, therefore, that the fund must be divided *per stirpes* and not *per capita*.

Solicitors: *Briggs, Vaughan, & Briggs; Moodie & Mills; Prior, Church, & Adams.*

W. L. C.

END OF VOL. XXXI.

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ADMINISTRATION — *Action — Costs — Deficient Personal Estate—Charge of Costs on specifically devised Realty—Cost of Probate Action.*] A testator by his will made several specific legal devises of real estate, of which one was to J., one of his executors, and another was to L. And he devised the remainder of his real estates, and bequeathed his personal estate to trustees, upon trusts for sale and conversion, and to stand possessed of the proceeds upon trust, after payment of his debts and funeral and testamentary expenses, to pay certain pecuniary legacies, and he gave the residue of the trust moneys unto and equally between his paternal next of kin. J. alone proved the will. The estates devised to J. and L. had, under the provisions of a settlement, been respectively liable to have two sums of £3000 and £1200 respectively raised out of them. The right to those sums had become vested in the testator. An action to administer the testator's estate was brought by W., one of the residuary legatees, against J. and L., the only question in dispute being whether the two sums of £3000 and £1200 were raisable as part of the testator's personal estate. It was held that they were not raisable, but that they had become merged in the estates on which they were respectively charged. The result of this decision was, that the personal estate was deficient. An action had been previously brought in the Probate Division, by W. and another residuary legatee, against J., impeaching the validity of the testator's will. The Court pronounced for the validity of the will, but ordered that the costs of all parties to the action should be paid out of the personal estate. On the further consideration of the administration action:—*Held*, that the personal estate and the proceeds of the sale of the residuary real estate must be applied in paying: (1) the costs, as between solicitor and client, of the executor, and his costs, charges, and expenses properly incurred (including his costs of the Probate action); (2) the costs, as between party and party, of the Plaintiff and of the Defendant L. rateably; and that, there being a deficiency, the costs of the

ADMINISTRATION—*continued.*

action (so far as not provided for) must be borne by the specifically devised real estates rateably, according to their respective values at the time of the testator's death:—*Held*, that there was no jurisdiction to charge the costs of the Probate action (other than the executor's costs) on the real estate:—*Held*, also, that the above order could be made, though some of the specific devisees were not before the Court.—But, whether the order could be enforced against the absent specific devisees, *Quære*. *In re* PRICE. WILLIAMS *v.* JENKINS - - - - - 485

2. —— *Charge of Legacies on Real Estate—Order of Application of Real and Personal Estate—Charitable Gift—Interest in Land—Power of Selection given to Trustees—Selection of Charities authorized to hold Land.*] A testator, after directing his executors (whom he also appointed trustees) to pay his debts and funeral and testamentary expenses, and giving various pecuniary legacies, gave all his personal estate and effects, except money or securities for money, to R. And he gave and devised all the rest, residue, and remainder of his estate, both real and personal, to his trustees, upon trust thereout, in the first place, to pay two specified sums, and, as to the residue thereof, or such part or parts thereof as might lawfully be appropriated for the purpose, for such one or more or any hospital of a charitable nature, and in such proportions as they in their uncontrolled discretion should think fit.—It was held by the Court of Appeal that the gift to R. was not specific, but that all the pecuniary legacies were payable in full before she could be entitled to anything under the bequest to her. The personal estate (including that bequeathed to R.) was insufficient for the payment of the legacies, and the real estate had to be sold to make good the deficiency. After the legacies had been paid there remained a surplus of the proceeds of the sale of the real estate:—*Held*, that the real estate was charged with the payment of the legacies only in aid of the personal estate, and that R. was not entitled to be recouped pro tanto out of the surplus the loss which she had suffered by the application of the personal estate bequeathed to her in the payment of legacies:—*Held*, also, that the

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trustees were entitled to appropriate the surplus to hospitals which were duly authorized to take land by devise. *In re* Ovey. Broadbent *v.* Barrow - - - - - 113

3. —— *Executor—Right of Retainer—Hinde Palmer's Act*, 1869 (32 & 33 *Vict. c.* 46)—*Appointment of Receiver.*] In a creditor's administration action brought against an executrix, who was also a creditor of the testator, a receiver was appointed, who obtained possession of certain legal assets as to which the executrix would have had a right of retainer if they had come to her hands:—*Held*, following with reluctance *Richmond* v. *White* (12 Ch. D. 361) and *In re Birt* (22 Ch. D. 604), that after the appointment of the receiver the executrix could not claim retainer out of any assets got in by him.—The estate was insolvent, there were both specialty and simple contract creditors, and the executrix, who was a simple contract creditor, had got in certain legal assets before the receiver was appointed:—*Held*, that she could only exercise her right of retainer as against creditors of equal degree with herself; and accordingly, that, the assets being treated as divided rateably among the specialty and simple contract creditors, she could retain her debt against the dividends payable to the simple contract creditors to the extent of the legal assets received by her.—Hinde Palmer's Act, 1869, the object of which was only to place specialty and simple contract creditors on an equal footing inter se for the purpose of distribution, ought not to be so construed as to give incidentally to an executor the power to defeat specialty as well as simple contract creditors; although the Act, by augmenting the fund for the payment of simple contract debts, has to that extent enlarged the right of retainer.—*Wilson* v. *Coxwell* (23 Ch. D. 764) approved.—*In re Williams' Estate* (Law Rep. 15 Eq. 270) distinguished. *In re* Jones. Calver *v.* Laxton - - - - 440

4. —— *Evidence—Corroboration.*] There is no rule of law which precludes a claimant from recovering against the estate of a deceased person on his own testimony without corroboration: although the Court will in general require such corroboration. *In re* Hodgson. Beckett *v.* Ramsdale - - - - - C. A. 177

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BURIAL GROUND—*Vendor and Purchaser—Disused Burial Ground—Sale—Building Land—Sale "under the authority of any Act of Parliament"—St. Saviour's, Southwark* (*Church Rate Abolition*) *Act*, 1883 (46 & 47 *Vict. c. xi.*), *ss.* 6, 7, 9—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *ss.* 3, 5—*Conditions of Sale—Sufficiency of Explanation.*] By the St. Saviour's, Southwark (Church Rate Abolition), Act, 1883, after reciting that certain land was then vested in trustees upon trust to apply the income for the purposes therein mentioned, the land was (sects. 6 and 7) vested in the trustees appointed by the Act upon trust to apply the income for purposes corresponding to those of the original trust; and by sect. 9 the trustees were empowered to sell the land or let it on building or other leases. The land had formerly been used as a burial ground, but in 1853

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it was closed as such by an Order in Council, and thus became a "disused burial ground."—By sect. 3 of the Disused Burial Grounds Act, 1884, building on any disused burial ground is prohibited, but sect. 5 enacts that nothing in the Act contained "shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament."—In 1885 the trustees under the Act of 1883 put the land up for sale by auction, describing it in the particulars as "building land," and stating in the conditions that although it was a disused burial ground they believed that it came within sect. 5 of the Act of 1884, and that they had therefore power under the Act of 1883 to sell it as building ground. The property was knocked down to Messrs. O., who signed the contract and paid the deposit.—The purchasers, who bought for building purposes, having refused to complete on the ground that building on the land was expressly prohibited by the Act of 1884:—*Held*, on a summons by the trustees under the Vendor and Purchaser Act, 1874, that the Act of 1883 did not constitute a sale or disposition "under the authority of any Act of Parliament," and that, having regard to the Act of 1884, the contract could not be enforced against the purchasers. TRUSTEES OF ST. SAVOUR'S RECTORY AND OYLER - - - 412

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COMPANY—*Appointment of Directors—Quorum—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *Sched.* 1, *Table A. arts.* 52, 53—*Subscribers of Memorandum of Association—Power of.*] The articles of association of a company followed Table A. of the Companies Act, 1862; clauses 52 and 53 of that table being to the effect that the number of directors shall be determined by the subscribers of the memorandum of association, and that until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors. There was also a special article that the number of directors should not be less than three nor more than ten, and that two should form a quorum.—Directors were appointed at a meeting attended by two only of the subscribers of the memorandum of association:—*Held*, that the special article only applied when the directors had been duly appointed, and that, the directors having been appointed at a meeting consisting of a minority of the subscribers of the memorandum of association, the appointment was invalid.—*Howbeach Coal Company* v. *Teague* (5 H. & N. 151) held not to have been impugned by *York Tramways Company* v. *Willows* (8 Q. B. D. 685). *In re* London and Southern Counties Freehold Land Company - - - - 223

2. —— *Directors — Liability—Sureties—Contribution—Discharge in Bankruptcy—Liability of Executor—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 49.] The directors of a company advanced moneys of the company upon an unauthorized security, and two sums of £600 and £400 so lent were lost. The £600 formed part of a loan of £800, and the £400 formed part of a loan of £1000, which was granted by the board of directors, and of which £400 was actually advanced and repaid, and a second £400 was advanced and not repaid. In an action by the company against one of the directors who had taken part in granting the loans, he was held liable to pay the two sums of £600 and £400 to the company, and, having paid them, he sued three of his co-directors for contribution.—One of the Defendants was not present at the meeting at which the loan of £800 was granted, and at which a cheque for the £800 was drawn, but he was present at a subsequent meeting at which the minutes of the former meeting were read and confirmed. The £800 had been already paid to the borrower:—*Held*, that, whether the Defendant would or would not have been liable to the company, there was no equity to compel him to contribute to the Plaintiff in respect of the £600.—The same Defendant was present at the meeting at which the loan of £1000 was granted, when he protested strongly against it. He was present at a subsequent meeting at which the minutes of the first meeting were read and confirmed, and he then signed a cheque which was drawn for the first £400:—*Held*, that by signing the cheque he had adopted the whole loan of £1000, and that he was therefore liable to contribute in respect of the second £400 which was lost.—Another Defendant filed a liquidation petition under the Bankruptcy Act, 1869, and had obtained a discharge from his creditors before the action was brought by the company against the Plaintiff:—*Held*, that this Defendant's liability to contribute was a liability "incurred by means of a breach of trust" within the meaning of sect. 49 of the Act, and that the Defendant was not released from it by the dis-

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charge.—The third Defendant died after the commencement of the action, and his administrator was then made a Defendant:—*Held*, that the liability to contribute survived against the Defendant's estate. RAMSKILL *v.* EDWARDS - 100

3. —— *Officer—Solicitor—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 165.] A solicitor of a company is not an officer of that company within the meaning of sect. 165 of the Companies Act, 1862. *In re* GREAT WESTERN FOREST OF DEAN COAL CONSUMERS COMPANY. CARTER'S CASE 496

4. —— *Increase of Capital—Special Resolution—General Meetings—Interval of "not less than fourteen days"—Invalidity of Resolution—Rights of Creditors—Contributories—Companies Act*, 1862, *s.* 51.] Under sect. 51 of the Companies Act, 1862, there must be an interval of not less than fourteen clear days between the meeting at which a special resolution—as for instance, for an increase of capital—is passed and the meeting confirming the resolution. If the interval is less than fourteen clear days the statutory defect in the resolution only affects the position of the company and its shareholders inter se, and does not concern the creditors.—Thus, where a director of a company took shares in new capital raised under a resolution passed and confirmed at meetings the interval between which was thirteen days only, and the company afterwards went into liquidation, he was held to be precluded from objecting to the validity of the resolution as a ground for his removal from the list of contributories.—*In re Railway Sleepers Supply Company* (29 Ch. D. 204) distinguished. *In re* MILLER'S DALE AND ASHWOOD DALE LIME COMPANY - - - - - 211

5. —— *Preference Shares—Memorandum of Association—Articles of Association.*] A company, with power by its memorandum of association to increase the capital, thereby stated to be "£10,000 divided into 1000 shares of £10 each," and with power by the contemporaneous articles of association "by special resolution from time to time to increase the capital of the company by the creation of new shares of such an amount as the company may by such special resolution determine, and any such new shares may be issued either with or without special privileges and priorities over the original shares,"—having gone into liquidation, a scheme for the reconstruction of the company was proposed with the sanction of the liquidator; and special resolutions were passed and confirmed for an increase of capital by the creation of new shares to be called preference shares, giving to the holders the right to a preferential dividend of 5 per cent.:—*Held* (reversing Kay, J.), that the proposed scheme was not ultrà vires, and might be sanctioned by the Court.—*Harrison* v. *Mexican Railway Company* (Law Rep. 19 Eq. 358) followed.—*Hutton* v. *Scarborough Cliff Hotel Company* (4 D. J. & S. 672; 2 Dr. & Sm. 514), *Guinness* v. *Land Corporation of Ireland* (22 Ch. D. 349), and *Ashbury* v. *Watson* (30 Ch. D. 376) distinguished. *In re* SOUTH DURHAM BREWERY COMPANY - - - - 261

6. —— *Promoter—Secret Commission—Agent for Vendor—Costs—Higher Scale—Rules of Supreme Court*, 1883, *Order* LXV., *rr.* 8, 9.] Agents employed by vendors to form and launch a company, for the purpose of purchasing some mines belonging to the vendors, undertook all the business connected with the issuing of the prospectus and the bringing out of the company. The agents respectively subscribed the memorandum and the articles of association of the company. They also guaranteed the subscription of the shares which were to be offered to the public. It was agreed between them and the vendors that they should receive a commission of £10,800 out of the purchase-money of £100,000 which was to be given by the company for the mines, and this payment was made after the formation of the company. The payment of the commission was not made known to the company. On its being afterwards discovered, an action was brought by the company to recover the £10,800 from the agents:—*Held*, on the evidence, that the agents were acting solely as agents for the vendors; that the purchase-money was not increased for the purpose of providing for the commission; that the commission was really paid by the vendors; and consequently that the agents were not promoters of the company, and were not liable to account to them for the commission.—The agreement between the vendors and the agents also provided that the latter should have the conduct of the sales of the company's ores, and should receive a commission of 2 per cent. on the invoice amounts of sales effected. The arrangement was to continue until good cause should be shewn to the contrary. The arrangement was embodied in an agreement for the purchase of the mines which was entered into between the vendors and a trustee for the intended company. The purchase agreement was adopted by the company after its formation, and the articles of association provided that the agents should conduct the sales of the company in accordance with the purchase agreement:—*Held*, that the interest which this arrangement gave the agents in the formation of the company was not sufficient to constitute them promoters.—Costs ought to be allowed on the higher scale in any case in which witnesses are properly examined in Court, and a long time is necessarily occupied in the argument. LYDNEY AND WIGPOOL IRON ORE COMPANY *v.* BIRD 328

7. —— *Reduction of Capital—Resolutions passed at the same Meeting to alter the Articles and reduce the Capital—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 50—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 9.] A company, the regulations of which did not authorize a reduction of capital, passed on the 30th of October—(1) A resolution inserting in the articles a power to reduce its capital, and (2) a resolution for reducing the capital. Both these resolutions were confirmed at a meeting on the 16th of November:—*Held*, by Kay, J., and by the Court of Appeal, that the Court could not confirm the resolution for the reduction of capital, for that a special resolution for that purpose could not be passed until after the regulations of the company had been altered so as to make them authorize a reduction of capital. *In re* PATENT INVERT SUGAR COMPANY [C. A. 166

8. —— *Register of Mortgages—Mortgage to*

Director—Companies Act, 1862 (25 & 26 *Vict.* c. 89), s. 43.] In 1874 a limited company mortgaged their property to a partnership consisting of three persons, of whom two were directors of the company. The mortgage was made for a term of seven years. It was not registered as required by sect. 43 of the Companies Act, 1862. In 1876 the partner who was not a director assigned his interest in the mortgage to the other two. In 1881 it was arranged that the mortgage should be continued for another seven years. The directors having been then informed that the mortgage ought to be registered, the secretary entered the particulars required by sect. 43 on a blank page in the company's register of transfers, altering the headings accordingly. The book in which the entries were made was marked on the outside "Register of Transfers." No other mortgage was ever made by the company, and the secretary deposed that no one had ever inquired for the register of mortgages.—The company being in liquidation:—*Held*, that there had been a sufficient registration of the mortgage in compliance with sect. 43, and that the mortgagees were entitled to enforce their mortgage.—*Held*, also, that debts contracted by the company during the seven years between the execution and the registration of the mortgage were not entitled to priority over the mortgage debt.—*Held*, also, that, even if the registration was ineffectual, inasmuch as one of the original mortgagees was not a director of the company the mortgage was not invalidated, and that it remained valid in the hands of the two directors after the assignment to them of the interest of the third mortgagee. *In re* Underbank Mills Cotton Spinning and Manufacturing Company - - - - - 226

9. —— *Transfer of Shares—Equitable Mortgage—Priority—Deposit of Certificates of Shares—Articles of Association—Lien of Company on Shares for Moneys due from Shareholder—Notice—Companies Act*, 1862 (25 & 26 *Vict.* c. 89), s. 30.] The articles of association of a company registered under the Companies Act, 1862, provided that the company should have a first and permanent lien and charge, available at law and in equity, on every share, for all debts due from the shareholder to the company. A shareholder deposited the certificates of his shares with his bankers as security for the balance due from him to them on his current account, and notice of the deposit was given to the company. The certificates stated that the shares were held subject to the articles of association:—*Held*, that the company could claim priority over the bankers in respect of moneys which became due from the shareholder to the company, even after notice of the bankers' advance had been given, on the following grounds:—First (by Brett, M.R., and Baggallay, L.J., Fry, L.J., doubting), that by the articles of association a contract had been entered into between the company and its shareholder whereby it should have a first lien on his shares for any debt due from him, that by this contract a priority was conferred upon the company as against all persons claiming only equitable interests in the shares and having notice of the articles of association, and that the doctrine of

Hopkinson v. *Rolt* (9 H. L. C. 514) did not apply:—Secondly, upon the authority of *Société Générale de Paris* v. *Tramways Union Company* (14 Q. B. D. 424), that by the deposit of the certificates of the shares with the bankers as a security for advances, only an equitable interest or trust was created in their favour, and that the Companies Act, 1862, s. 30, relieved the company from taking notice of any trust created in respect of its shares.—Decision of Field, J., reversed. Bradford Banking Company *v.* Briggs & Co. - C. A. 19

10. —— *Winding-up—Contributory—Conditional Application for Shares—Condition Subsequent—Allotment—Non-compliance by Company with Condition—Neglect to rescind by Allottee—Sale and Transfer by Allottee.*] A new company was constituted to take over the assets and liabilities of an old company in liquidation, under a scheme by which each shareholder in the old company was entitled to a share in the new company in respect of every share held by him in the old company, but no sum was to be deemed paid up on any share, £1 per share was to be paid up within a month, and no share was to be transferred until all calls thereon had been paid.—R. F., a shareholder in the old company, had declined to come in under the scheme, but was willing to pay £700 on being relieved within two years of all liability in respect of the old company. Before any payment had been made by R. F., one Fisher, a shareholder in the old company, applied for 700 shares in the new company "on condition that I am credited with £1 per share paid into a fund by R. F."—By a resolution of the directors of the new company passed in the presence of Fisher, certain ordinary shares were allotted to him, and 700 ordinary shares were also allotted to him "conditional," that word being placed opposite to them in a list of allotments appended to the resolution.—Letters of allotment and certificate in respect of the first-mentioned ordinary shares were sent to Fisher, but none were sent to him in respect of the 700 shares, and his name was, but without his knowledge, entered on the register of shareholders in respect of the 700 shares as well as the others, but with the word "conditional" written opposite the 700 shares.—Fisher afterwards sold and transferred 400 of the 700 shares to Sherrington, and the company registered the transfer and issued certificates to Sherrington for 400 shares, crediting him with £1 as paid up thereon and placing him on the register as the holder of 400 shares. R. F. was not relieved from his liability within the two years, and did not pay the £700; and the new company went into liquidation without any steps having been taken by Fisher to enforce the condition of his application or to rescind it:—*Held*, in *Fisher's Case*, that the condition attached to his application was a condition subsequent, which, owing to the liquidation of the company, could not now be enforced; that under the circumstances Fisher must be deemed to be a member of the company within the meaning of sect. 23 of the Companies Act, 1862, and must be placed upon the list of contributories in respect of 300 shares:—And, *held*, in *Sherrington's Case*, that he must be placed upon the list of contributories in respect of 400

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shares. *In re* SOUTHPORT AND WEST LANCASHIRE BANKING COMPANY. FISHER'S CASE. SHERRINGTON'S CASE - - - - - C. A. 120

11. —— *Winding-up—Contributory—"Member"—Subscribing Memorandum—Application for additional Shares—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 23.] On the formation of a limited company G., a director, subscribed the memorandum of association for fifty shares as his qualification. Shortly afterwards he expressed his intention of taking fifty more shares, and thereupon, in order to satisfy the requirements of the Stock Exchange prior to settlement and quotation, signed a formal letter of application for 100 shares, it being, as alleged, intended by him and also understood by his co-directors that these 100 shares included the fifty for which he had subscribed the memorandum. 100 shares were then duly allotted to him; they were registered in his name, and he fully paid them up.—The company having afterwards been ordered to be wound up, an application by the liquidator under sect. 23 of the Companies Act, 1862, to fix G. as a contributory in respect of the fifty shares for which he had subscribed the memorandum, was dismissed with costs. *In re* CROOKE'S MINING AND SMELTING COMPANY. GILMAN'S CASE [420

12. —— *Winding-up—Fraudulent Preference—Debenture-holder—Mortgagee—Right of Action—Rule in Bankruptcy—25 & 26 Vict. c.* 89, *s.* 164.] The rule in bankruptcy that the doctrine of fraudulent preference cannot be enforced for the benefit of a single creditor or class of creditors, but only for the benefit of the general body of creditors, is applicable to the winding-up of a company under the Companies Act, 1862. Consequently, sect. 164 confers no right upon a debenture-holder of a company in liquidation to take proceedings on behalf of himself and the other debenture-holders to set aside a transaction on the ground of fraudulent preference:—B. and H., directors of a limited company, B. being managing director, advanced moneys from time to time to the company to purchase goods and discharge pressing claims. In September, 1884, the company's premises were burnt down, and the insurance company admitted their liability to pay £3000 in respect of the damage. B. and H. then held a "directors' meeting,"—two directors forming a quorum—and passed resolutions for commencing actions against the company for the moneys advanced, and for instructing a firm of solicitors to appear and consent on behalf of the company to immediate judgment. The actions were accordingly brought and immediate judgment taken by consent, and thereupon B. and H. obtained the £3000 from the insurance company under garnishee orders, the company being at that time insolvent. In December, 1884, the holder of a mortgage-debenture, in form a charge upon all the property of the company both present and future, brought an action on behalf of himself and the other holders of mortgage debentures against the company, B. and H., claiming (1) repayment of the £3000 by B. and H., and (2) the usual relief in a debenture-holder's action. Two days after the issue of the writ a petition was presented for winding up the

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company, and shortly afterwards a winding-up order was made. At the trial the Plaintiff relied on sect. 164 of the Companies Act, 1862, as entitling him to recover the £3000 on the ground of "fraudulent preference":—*Held*, that so much of his claim as was based on fraudulent preference must be dismissed with costs, but that he was entitled to the ordinary judgment for accounts and inquiries as to the debenture debt.—*Ex parte Cooper* (Law Rep. 10 Ch. 510) considered. WILLMOTT *v.* LONDON CELLULOID COMPANY - 425

13. —— *Winding-up—Petition—Provisional Liquidator, Appointment of—Resolution for Voluntary Winding-up—Confirmatory Resolution—Commencement of Winding-up.*] On the day of the presentation of a creditor's petition for the compulsory winding-up of a company a provisional liquidator was appointed under that petition. A meeting of the company was afterwards held, at which a resolution was passed for a voluntary winding-up, and at a subsequent meeting this resolution was confirmed. A supervision order was then made on the petition:—*Held*, that the winding-up must be treated as having commenced at the date of the confirmatory resolution, and not at the date of the appointment of a provisional liquidator. *In re* EMPEROR LIFE ASSURANCE SOCIETY - - - - - - 78

14. —— *Winding-up Order—Title of Petition—Mistake—Amendment—Advertisement.*] A winding up order had been pronounced on a petition intituled, "In the matter of A. and N. Hotel Company, Limited." Subsequently, before the order was drawn up, the Petitioners discovered that the word "company" did not form part of the registered title of the company, though the company had themselves, while carrying on business, usually adopted the word. Thereupon, on an ex parte application by the Petitioners, the Court made an order giving leave to amend and re-advertise the petition, and directing the winding-up order to be drawn up seven days after the advertisement.—A motion by the company to discharge the ex parte order was dismissed with costs. *In re* ARMY AND NAVY HOTEL - 644

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DESCENT—*Inheritance—Descent ex parte maternâ or ex parte paternâ—Marriage Settlement—Construction—Ultimate Limitation to right Heirs of Wife's deceased Mother—Inheritance Act* (3 & 4 *Will.* 4, *c.* 106), *s.* 4.] Sect. 4 of the Inheritance Act (3 & 4 Will. 4, c. 106) is not merely declaratory of the old law; it introduces a new rule as to the tracing of the descent in the case of a limitation to the heirs general of a deceased person. By a marriage settlement executed in 1810, real estate of the wife was limited to the use of the husband for life, remainder to the use of the wife for life, and, after limitations in favour of the issue of the marriage, the ultimate limitation was "to the use of the right heirs of J. W., deceased (the mother of the wife), for ever." At the date of the settlement the wife was seised of part of the real estate as the heiress-at-law of her deceased mother, and of the other part as one of the co-heiresses of her deceased maternal great uncle. The wife died in 1846; the husband died in 1871. The limitations in favour of the issue all failed on the death in 1880 of the surviving son of the marriage:—*Held*, that, if under the ultimate limitation the wife took the estate as a purchaser, *Mandeville's Case* (Co. Litt. 26 b) did not apply, and that the descent from her would be traced in the ordinary way, and not ex parte maternâ. But *held*, that, under the ultimate limitation, the wife took the estate as part of the old estate which she had before the marriage, and that the descent was not broken by the settlement. Moore *v.* Simkin [95

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ELECTION—*Heirlooms—Bequest of—Tenant for Life—Legatees—Compensation.*] A testator, who died in 1882, by his will dated in 1878, gave certain chattels upon trust for sale, for the benefit of his two younger sons, and the residue of his estate to his eldest son, C.—The chattels so bequeathed by the will were, in fact, heirlooms settled by a deed dated in 1877, upon trust to go and be held with a certain mansion-house, of which C. was tenant for life:—*Held*, upon the questions whether C. having elected to take under

ELECTION—*continued.*
the will, was or was not put to his election between the benefits given to him by the will and the chattels which were bequeathed by the same will, and whether he ought not to make compensation to his younger brothers, that he was not bound to make any compensation out of his legacy to his younger brothers; that he had no interest in the chattels apart from the mansion-house, which he could make over for their benefit, and that no case of election arose. The engrafted doctrine of compensation does not apply to the case of a person electing to take under the instrument which gives rise to the election.—*Wilson* v. *Lord Townsend* (2 Ves. 693) discussed and not followed. *In re* LORD CHESHAM. CAVENDISH *v.* DACRE - - - - - - 466

2. —— *Married Woman—Settlement on Marriage of female Infant—Restraint on Anticipation—Covenant to settle after-acquired Property.*] The doctrine of election is founded on the presumption of a general intention that every part of an instrument shall take effect, and the presumption of such general intention may be rebutted by an inconsistent particular intention apparent in the instrument.—Therefore, where a marriage settlement settled a fund for the separate use of the wife for life with restraint on anticipation, and contained a covenant by the wife (then an infant) to settle future property:—*Held* (reversing the decision of Kay, J.), that the wife could not be compelled to elect between after-acquired property and her interest in the settled fund, but was entitled to retain both. *In re* VARDON'S TRUSTS [275

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HUSBAND AND WIFE—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 5—*Reversionary Interest of Woman married before the Act—Accruer of Title—Property coming into Possession after the Act.*] Property to which at the time of the commencement of the Married Women's Property Act, 1882, a woman married before the Act was entitled subject to a life estate, but not for her separate use, *held* not to become her separate estate by falling into possession after the commencement of the Act.—If a woman married before the commencement of the Married Women's Property Act, 1882, has before the commencement of the Act acquired a title, whether vested or contingent, and whether in reversion or remainder, to any property, such property is not made her separate estate by sect. 5 of the Act, though it falls into possession after the Act.—*Baynton* v. *Collins* (27 Ch. D. 604) overruled. REID *v.* REID [C. A. 402

2. —— *Separation Agreement—Judicial Separation—Reconciliation*—20 & 21 *Vict. c.* 85, *s.* 25.] A husband and wife, when before the Divorce Court, made an agreement in writing that if judicial separation were decreed, the wife should be permitted to enjoy during her life certain furniture; but that if she annoyed her husband her enjoyment of it should cease. Judicial separation was decreed, and the wife took possession of the furniture. The husband and wife afterwards resumed cohabitation:—*Held* (affirming decision of North, J.), in an action by the wife to recover the furniture, that the agreement came to an end when cohabitation was resumed; and that as the wife was entitled to the furniture during separation only, she took nothing under the 20 & 21 Vict. c. 85, s. 25, which relates to property acquired by a wife during separation.—Dictum in *Randle* v. *Gould* (8 E. & B. 457) questioned. NICOL *v.* NICOL - - - C. A. 524

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INFANT—*Maintenance—Charge on Infants' Real Estate.*] Two infants were entitled to successive estates tail in remainder after the life estate of their father, which life estate had been sold under his bankruptcy. There being no income applicable to the maintenance of the infants, an application was made on their behalf that a yearly sum might be allowed for that purpose, and borrowed on the security of a mortgage or charge on the real estate to which they were entitled as above, the amount for which the charge was to be given including the premiums on the insurance requisite for the protection of the lender:—*Held*, that an order sanctioning the scheme could not be made, and that the principle of *In re Howarth* (Law Rep. 8 Ch. 415) would not support it, for that, although judgment might be recovered against the infants for necessaries supplied to them, it could not be recovered for premiums on the policies, and, moreover, judgment could not be recovered against one infant for necessaries supplied to the other, and a judgment would not charge the estates of the infants, inasmuch as those estates were so circumstanced that they could not be delivered in execution. *In re* Hamilton (Infants) - - - - - 291

2. —— *Practice—Form of Decree as to Moneys received by Trustee during his Infancy.*] By articles of settlement on the marriage of Mr. and Mrs. G. in 1874, it was agreed that the wife's property should be vested in a trustee or trustees to be approved of by G. and wife, upon the usual trusts of a marriage settlement, with power to purchase a leasehold house. In 1875 G. and wife purchased a leasehold house, which was assigned to A., who agreed to hold it on the trusts of the articles. In 1883 a settlement was executed by which, after reciting that the property consisted of the house, and certain other particulars, G. and wife appointed R. to be trustee and assigned to him part of the property, and agreed that the rest should be transferred to him. In February, 1884, A. assigned the leasehold to R., who did not attain twenty-one until November, 1884. One of the children of the marriage took out in 1885 an originating summons against A. and R. to have their accounts taken:—*Held*, by Bacon, V.C., that an account must be directed against A. and R., limited as regarded R. to moneys and properties received by him since he attained twenty-one.—*Held*, on appeal, that the proper course was to direct an account in the usual form against A., with an inquiry whether all or any and what parts of the trust property had come to the hands of R., and what had been his dealings and transactions in respect of the same, and as to the dates

INFANT—*continued.*

of and circumstances attending such receipts, dealings, and transactions. *In re* Garnes. Garnes *v.* Applin - - - - - C. A. 147

3. —— *Practice—Next Friend—Testamentary Guardian.*] A father authorized a stranger to act as next friend to his infant children: he died, having by will appointed his wife, their mother, guardian of his children:—*Held*, that the mother had the right to remove the next friend and be substituted in his place. Hutchinson *v.* Norwood - - - - - - 237

—— Defendant to partition action—Judgment by default - - - - 494
See Partition Action.
—— Order for sale of real estate - - 247
See Practice. 11.
—— Settlement—Election - - - 275
See Election. 2.
INFRINGEMENT — Patent — Inquiry as to damages - - - - - 399
See Patent. 3.
INJUNCTION—Appeal—Bankruptcy of appellant
See Practice. 2. [630
—— Threatening legal proceedings - - 638
See Patent. 1.
—— Unauthorized use of name - - 354
See Practice. 7.
INSOLVENCY—Security for costs - - 34
See Practice. 14.
INTENTION—Evidence of - - - 460
See Will. 3.
INTEREST—Mortgage—Money in Court—Delay
See Mortgage. 7. [90
—— Purchase-money - - - 168
See Vendor and Purchaser. 2.
INTERIM INCOME—Vesting - - 380
See Power. 4.
INTERROGATORIES - - - 374
See Practice. 8.
INVESTMENT—Liability of trustees - 390
See Trustee.

JOINDER—Cause of action - - - 68
See Practice. 1.
JUDGMENT—By default - - - - 478
See Practice. 15.
JUDICIAL SEPARATION - - - 524
See Husband and Wife. 2.
JURISDICTION—Disentailing deed—Rectification - - - - - 251
See Tenant in Tail.
—— Solicitor—Negligence—Summons - 346
See Solicitor. 3.
—— Vendor and Purchaser Act - - 168
See Vendor and Purchaser. 2.

LANDS CLAUSES ACT—*Costs—Jurisdiction—Discretion of Court—Compulsory Purchase of Land by Public Body—Payment of Purchase-money into Court—Application for Payment out to Person absolutely entitled—Effect of Enactment by reference to former Act*—8 & 9 *Vict. c.* 18, *s.* 1—3 & 4 *Vict. c.* 87, *s.* 49—18 & 19 *Vict. c.* 95, *ss.* 9, 11—*Rules of Supreme Court*, 1883, *Order* LXV., *r.* 1.] The Act

LANDS CLAUSES ACT—*continued.*

18 & 19 Vict. c. 95, empowered the Commissioners of Works and Public Buildings, whom it incorporated for the purpose, to take land compulsorily for the purpose of building public offices. Sect. 9 provided that certain sections (including sect. 49) of a previous Act (3 & 4 Vict. c. 87), which had empowered the Commissioners to execute other works, should be deemed to be repeated in the later Act, with the alterations necessary to make the same applicable to its purpose. Sect. 11 provided that any purchase-money payable into the bank should be paid to the account of the Accountant-General of the Court of Chancery, and should be applied under the directions of that Court in like manner as moneys were by the earlier Act directed to be applied under the directions of the Court of Exchequer, "with such power to the Court of Chancery with regard to costs" as by the earlier Act were vested in the Court of Exchequer. Sect. 49 of the earlier Act provided that, when purchase-money was required to be paid into the bank in the name of the Accountant-General of the Court of Exchequer, and to be re-invested in land, it should be lawful for the Court to order the expenses of all purchases from time to time to be made under the Act to be paid by the Commissioners. This Act contained no other provision as to costs:—*Held*, that the effect of these enactments was to introduce the incorporated sections of the earlier Act into the later Act, just as if they had been enacted in it for the first time, and that, consequently, the later Act, with those sections in it, must be treated as having been passed after the Lands Clauses Consolidation Act, 1845:—*Held*, therefore, that the provisions of sect. 80 of the Lands Clauses Act were, by virtue of sect. 1 of that Act, incorporated with the Act of 18 & 19 Vict. c. 95, and that the Court had power to order the Commissioners to pay the costs of an application for the payment out of purchase-money to the persons who had become absolutely entitled to the land in respect of which the money had been paid in.—*In re Cherry's Settled Estates* (4 D. F. & J. 332) disapproved.—*Held*, also, that the Commissioners did not represent the Crown, and that, if they did, the effect of the incorporation of the Lands Clauses Act with the Act 18 & 19 Vict. c. 95, was to make the provisions of the Lands Clauses Act binding on them.—Whether rule 1 of Order LXV. gives the Court power to order the payment of costs in a case in which there would have been no jurisdiction to do so before the Judicature Act, *quære*. *In re* WOOD'S ESTATE. *Ex parte* HER MAJESTY'S COMMISSIONERS OF WORKS AND BUILDINGS - - C.A. 607

2. —— *Owner under Disability—Valuation—Declaration by Surveyors—Specific Performance—8 & 9 Vict. c. 18, s. 9.*] On a sale by agreement to a company by an owner under disability:—*Held*, that the requirements of the Lands Clauses Consolidation Act, 1845, sect. 9, must be strictly complied with, and that the absence of a declaration in writing annexed to the valuation and subscribed by the surveyors was fatal to a claim by the company for the specific performance of the contract, although the valuation was made by surveyors without formal appointment. BRIDGEND GAS AND WATER COMPANY *v.* DUNRAVEN - 219

LAPSE—Exoneration of personal estate from debts and legacies - - - 56
See WILL. 4.

LEASE—Settled Land Act - - - 504
See SETTLED LAND ACT. 1.

LEGATEE—Attesting witness - - 72
See WILL. 1.

LIEN—Company—Shares - - - 19
See COMPANY. 9.

—— Solicitor - - - - - 296
See SOLICITOR. 2.

LIGHT—*Ancient Lights—Alteration of Building—Advancement of Plane of new Windows—Abandonment of Easement—Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *s.* 3.] The right acquired under the Prescription Act, sect. 3, is a right to the access and use of the whole or a substantial part of the particular cone of light which has passed for the statutory period over the servient to the dominant tenement.—Per Fry, L.J.: The word "access" in the section refers not to the access through the aperture of the dominant, but to the freedom of passage over the servient, tenement, although the aperture which admits the light into the dominant tenement defines the area which is to be kept free over the servient tenement. "The right thereto," means the right to the same access and use of light to and for any building. —The Act does not require any identity, structural or otherwise, in the building, which after the twenty years is to enjoy the right, with the building which has acquired the right; but the right, although not in gross, but one which must be claimed in respect of a building, may be claimed in respect of any building which is enjoying the whole or a substantial part of the light which passed into the dominant tenement through the old aperture.—Consequently no alteration in the plane of the windows of the dominant tenement, either by advancing or setting back the building, will destroy the right so long as the owner of the dominant tenement can shew that he is using through the new apertures in the wall of the new building the same, or a substantial part of the same, light which passed through the old apertures into the old building.—But the right to relief may be lost even where there is no substantial alteration if the owner of the dominant tenement has by his alteration so confused the evidence that he cannot prove the identity of the light.—S., in 1872, pulled down a building in the east wall of which were ancient lights, and erected on the site a new building with larger and more numerous windows. No record was preserved of the positions or dimensions of the ancient lights; but it was found as a fact that substantial portions of six of the new windows corresponded with three of the ancient lights. The east wall had been advanced by distances varying from 2 ft. 3 in. to 13 in., the effect of which was slightly to alter the plane of the new windows:—*Held* (affirming the decision of North, J.), that the alteration made by S. did not amount to an abandonment of his right, and that the Plaintiff was entitled to an injunction to restrain any obstruction of so much of the six new windows as corresponded with the three ancient lights. SCOTT *v.* PAPE C. A. 554

LIMITATIONS, STATUTE OF—*Following Assets—Administration—Delay—Lapse of Time—Ac-*

LIMITATIONS, STATUTE OF—*continued.*

quiescence — Residuary Legatees, Action against, for Restitution—3 & 4 *Will.* 4, *c.* 27, *s.* 40; 1 *Vict. c.* 28—*Acknowledgment of Debt—Payment of Interest.*] In 1843 G. mortgaged to a firm of solicitors a freehold farm, and also the furniture and farming stock, the mortgagor being permitted to use the furniture and stock but not to sell without consent of the mortgagees. In 1859 G. died, having by his will bequeathed the furniture to his unmarried daughters and devised the farm to A., B. and C. upon trust to allow his unmarried daughters to occupy it, they keeping down the mortgage-interest, and having bequeathed his residuary personal estate to A., B. and C., whom he appointed executors upon trust for sale and division among his children. By a codicil the testator directed that his unmarried daughters should pay a rent of £600 for the farm, and on their giving it up it should be let. Under the provisions of the will, and with the knowledge of the mortgagees, who made no objection, two of the testator's four daughters continued to carry on the farm as tenants to the trustees of the will, and for that purpose used the furniture and took to part of the farming stock at a valuation as against their shares of residue. In 1861 the executors, with the knowledge of the mortgagees, sold the remainder of the testator's residuary personal estate, consisting almost entirely of farming stock, and distributed the proceeds among the residuary legatees pursuant to the trusts of the will, the two daughters who were tenants of the farm applying their shares in carrying it on. In 1863 one of these two daughters married, whereupon her husband took a lease from the trustees, and bought out the interest of the unmarried daughter in the stock and furniture. The interest on the mortgage was, by the direction of the trustees, paid to the mortgagees by the tenants of the farm out of the rent, the mortgagees giving receipts to the tenants only. In 1882, the interest having been unpaid from August, 1880, and the security being worthless owing to an existing prior mortgage, the legal personal representative of the surviving mortgagee sued G.'s executors for an alleged devastavit in having distributed G.'s residuary personal estate without providing for the mortgage debt (*Blake* v. *Gale* (22 Ch. D. 820)), when it was declared that the executors were not liable for a devastavit, but judgment was pronounced for a sale of the mortgaged premises, and for administration of G.'s estate. Under that judgment the Chief Clerk certified that the security was unsaleable, and allowed the payments by the executors to the residuary legatees, but the order on further consideration was made without prejudice to any proceedings the Plaintiff might take against any other persons than the executors. Thereupon, in 1885, the Plaintiff brought an action against the residuary legatees for payment of the mortgage debt out of G.'s assets received by them. The Defendants pleaded the Statutes of Limitation, delay, and acquiescence:—*Held*, that although the legal debt under the mortgage was still subsisting, and was in no way barred by statute, yet that the Plaintiff's claim against the residuary legatees, being in the nature of an equitable demand, was barred by lapse of time and acquiescence. Blake *v.* Gale - - - 196

LUNACY ORDERS, 1883, r. 59 - - 160
See Lunatic. 3.

LUNATIC—*Power—Consent to exercise of Power—Lunacy Regulation Act*, 1853 (16 & 17 *Vict. c.* 70), *s.* 137.] A marriage settlement contained a power of advancement exercisable by the trustees after the death of the husband and wife, or at any time previously if they or the survivor of them should direct. The husband was found lunatic:—*Held*, that under the Lunacy Regulation Act, 1853, s. 137, the Court had jurisdiction to authorize the committee to consent on behalf of the lunatic to the exercise of the power. *In re* Nevill - - - - - C. A. 161

2. —— *Consent to Appointment of New Trustees—Lunacy Regulation Act*, 1853 (16 & 17 *Vict. c.* 70), *s.* 137.] A will contained a power of appointment of new trustees exercisable with the consent of the tenant for life. The trustees having died, the tenant for life, who had been found lunatic, presented a petition in Lunacy and Chancery by the committee of her estate as next friend for the appointment of new trustees:—*Held*, that there was no jurisdiction in lunacy to appoint new trustees, and that the only proper application in lunacy was to ask for an order authorizing the committee to consent on behalf of the lunatic to an appointment of trustees under the power. *In re* Garrod - - C. A. 164

3. —— *Practice—Lunacy Regulation Act—Petition for Application of Property of alleged Lunatic—Notice signed by Agent of Solicitor—Lunacy Orders*, 1883, *r.* 59.] The notice of a petition under the Lunacy Regulation Act, 1862, ss. 12, 13, 14, 15, which was served on an alleged lunatic, was signed by the London agent of the petitioner's solicitor, expressly as agent:—*Held*, that this was not a compliance within the 59th rule of the Lunacy Order, 1883, which directs the notice to be signed by the petitioner or his solicitor. *In re* Summerville - C. A. 160

—— New trustees—Trustee Act - - 522
See Trustee Acts. 1.

MAINTENANCE—Infant - - - 291
See Infant. 1.

MARRIED WOMAN—Election—Settlement on female infant - - - 275
See Election. 2.

MARRIED WOMEN'S PROPERTY ACT—Reversionary interest - - - 402
See Husband and Wife. 1.

MEMORANDUM OF ASSOCIATION 223, 261, 420
See Company. 1, 5, 11.

MINE—Lease—Settled Land Act - - 504
See Settled Land Act. 1.

MISTAKE—*Trustee—Release—Cestui que Trust—Lapse of Time—Evidence against Estate of a dead Man—Corroboration.*] A release to a trustee set aside after the lapse of more than twenty years, and after the death of the trustee, on evidence of the Plaintiff (corroborated by the tenor of the deed) that it was executed in error. In such a case it is not necessary to prove fraud. There is no rule that the uncorroborated evidence of a claimant against the estate of a dead man will be rejected, but it will be regarded with jealous

MISTAKE—*continued.*

suspicion.—A testator bequeathed one-half of his residuary personal estate to his sister and one quarter thereof to each of his two nieces: he appointed his sister trustee and executrix of his will, and died in the year 1855. The residuary personal estate consisted principally of railway shares and stocks, and at the time of passing the residuary account it was valued at £42,000. The nieces lived with their aunt, who had brought them up from childhood. In 1859, the nieces executed a release of all suits and causes of action in favour of their aunt in consideration of the payment of £10,500 to each. At the time of the execution of the release, the railway shares and stocks had increased in value, and the share of each of the nieces was worth much more than £10,500. The release was drawn up by the aunt's solicitor, and the nieces had no independent advice and executed it in error, but no fraud was imputed. In 1879, the aunt died. In 1883, an action was commenced by one of the nieces to set aside the release:—*Held*, that the release was invalid and must be set aside. *In re* GARNETT. GANDY *v.* MACAULAY - - **C. A. 1**

—— Disentailing deed—Rectification - *See* TENANT IN TAIL.

—— Release to executors - - - **648** *See* SETTLEMENT. 2.

—— Winding-up petition - - - **644** *See* COMPANY. 14.

MORTGAGE—*Foreclosure—Consolidation—Mortgage of Two Estates by same Mortgagor—Separate Redemptions—Costs of Action.*] When a mortgagee brings an action to foreclose two mortgages of two distinct estates, but which mortgages are by force of the statute or otherwise not liable to be consolidated, the costs of the action are not to be charged against each estate, but must be apportioned rateably between the two estates.—*Clapham* v. *Andrews* (27 Ch. D. 679) overruled. DE CAUX *v.* SKIPPER. TEE *v.* DE CAUX **C. A. 635**

2. —— *Foreclosure—Costs—Equitable Jurisdiction—County Court Scale.*] In an action to foreclose a mortgage for £65 18*s.* 10*d.*, where both Plaintiff and Defendant lived at the same place:—*Held*, that the Plaintiff was entitled only to such costs as he would have obtained in the County Court.—*Simons* v. *McAdam* (Law Rep. 6 Eq. 324) followed. CROZIER *v.* DOWSETT **67**

3. —— *Foreclosure—Costs of Abortive Sale—Personal Order for Payment—Form of Order.*] On a sale by auction on behalf of a mortgagee, in exercise of the power of sale contained in his mortgage deed, the acceptance by the auctioneer, on behalf of the vendor and with his concurrence, of a cheque (which was dishonoured on presentation) in lieu of cash for the deposit is not, having regard to the common practice at sales by auction, unreasonable, and is not such an act of negligence on the part of the mortgagee as to deprive him of his right to the costs of the abortive sale.—A mortgagee being now entitled to combine in one action his right to judgment on the mortgage covenant against the mortgagor personally, with his right to foreclosure, is entitled:—(*a.*) If the amount of debt and interest is proved, admitted, or agreed to at the trial, to judgment for immediate payment of the whole amount.—(*b.*) If the amount is not so proved, admitted, or agreed to, to an account of what is due to him for principal and interest in respect thereof, and to judgment for payment of the whole amount immediately the same is certified—unless in either case the Judge in his discretion gives time.—*Semble*, the allowance of one month for payment from the date of the certificate is a reasonable exercise of such discretion.—In the order for personal payment the costs will be limited to such costs only as would have been incurred if the action had been brought for payment only of the debt.—Order of North, J., affirmed. FARRER *v.* LACY, HARTLAND & Co. **[C. A. 42**

3. —— *Foreclosure—Equitable Mortgage by Deposit—Costs of Mortgagee.*] In an action to foreclose a mortgage by deposit of title deeds, accompanied by a memorandum by which the mortgagor agreed to execute a legal mortgage of his estate and interest at the request of the mortgagee, the Taxing Master disallowed the following charges in the mortgagees' bill of costs:—(1) Costs of an action in the Queen's Bench Division for recovery of the debt. (2) Costs of correspondence with a surety who had given a promissory note for part of the debt. (3) Costs of investigating the mortgagor's title. (4) Costs of preparing a legal mortgage which the mortgagor refused to execute. (5) Costs of correspondence with the mortgagor as to the legal mortgage.—*Held*, by *Pearson*, J., that heads (1) and (2) must be allowed, but that the Taxing Master was right in disallowing (3), (4), and (5).—*Held*, on appeal, that a mortgagee is entitled to be allowed in account the costs of all proceedings reasonably taken by him to enforce his rights under the mortgage contract, including proceedings to obtain the mortgage money or any part thereof, either from the mortgagor, or from a surety, or out of the estate, and that therefore heads (2), (4), and (5) must be allowed. That (1) would ordinarily be a proper charge, but in the present case it could not be allowed as it was excluded by the special terms of the order directing taxation, and that (3) could not be allowed, as an investigation of the title was not necessary for the purpose of preparing the legal mortgage, but that the mortgagees must be allowed all expenses properly incurred with reference to the preparation of the legal mortgage, which would include the expense of such inspection of the title deeds as was necessary for preparing it.—*Ellison* v. *Wright* (3 Russ. 458) preferred to *Lewis* v. *John* (9 Sim. 366). NATIONAL PROVINCIAL BANK OF ENGLAND *v.* GAMES **[C. A. 582**

5. —— *Foreclosure — Order absolute — Discharge of Receiver—Receipt of Rents by Receiver after Certificate and before Day fixed for Redemption.*] If, between the date of the certificate under a foreclosure judgment and the day fixed for redemption, rents of the mortgaged property have been received, either by the mortgagee or by a receiver appointed in the action, those rents must go in reduction of the amount due to the mortgagee, and a fresh account must be taken.—But, if, after the day fixed for redemption, the mortgagee receives rents, the certificate will not

MORTGAGE—*continued.*

be reopened, and the mortgagee is entitled to retain the rents so received. JENNER-FUST *v.* NEEDHAM - - - - - 500

6. —— *Foreclosure and Redemption—Form of Judgment.*] In an action by a second mortgagee to redeem the first mortgagee and to foreclose the mortgagor, the proper form of judgment is, that in default of the Plaintiff redeeming, the action is to stand dismissed with costs. HALLETT *v.* FURZE [312

7. —— *Payment off of Mortgage—Interest in Lieu of Notice—Order for Payment out of Fund in Court—Delay in Completion of Order.*] One of the beneficiaries under a will mortgaged her interest in the testator's estate. She gave the mortgagees six months' notice to pay off the mortgage on the 1st of July, 1885, and on the 20th of May, 1885, an order was made in an action to administer the estate, on the application of the beneficiaries and in the presence of the mortgagees, which directed (inter alia) payment to the mortgagees out of funds in Court standing to the credit of the mortgagor, of the mortgage debt, with interest up to the 1st of July, 1885. Owing to delay in the completion of the order the payment could not be made on the 1st of July, and on the 2nd of July the mortgagees took out a summons, claiming six months' additional interest in lieu of a fresh six months' notice to pay off the mortgage. On the 20th of July the order was completed, and on the 21st of July the mortgagees took the sum mentioned in the order out of Court:—*Held*, that the mortgagees were only entitled to additional interest from the 1st to the 21st of July, on the ground that, by accepting the order, they assented to payment out of the fund in Court subject to all the contingencies to which the completion of the order might be subject. *In re* MOSS. LEVY *v.* SEWILL - - - - - - 90

8. —— *Priority—Notice—Solicitor—Conveyancing Act*, 1882 (45 & 46 *Vict.* c. 39), *s.* 3, *sub-s.* 1, *cl.* 2.] In June, 1875, A. mortgaged his share of trust property to E. by deed, which did not disclose any prior charge, and contained the usual covenant by A. that he was entitled to assign free from incumbrances.—Notice of this mortgage and of a further charge created in May, 1877, was served on behalf of E. on the trustees of the property in November, 1881.—A.'s share was subject to a prior mortgage to B., a solicitor, who was paid off in 1873, when a fresh mortgage was executed to C., which in July, 1874, was transferred by C. to D. (with a further charge in February, 1881).—B. was solicitor for the trustees and A. the mortgagor, and had acted as solicitor for C. and D. in the mortgage transactions of 1873 and 1874, and also as solicitor for E. in the mortgage transaction of June, 1875. The trustees had not received notice of any charge before receiving notice of E.'s mortgage in November, 1881.—*Held*, having regard to sect. 3, sub-sect. 1, cl. 2, of the Conveyancing Act, 1882, that E.'s charge, of which notice was first given, was entitled to priority, as his mortgage deed shewed a title in A. free from incumbrances; and that as the Court declined to infer that B. had any recollection, or that inquiries made by him when acting as solicitor for E. in the transaction would have elicited

MORTGAGE—*continued.*

from A. the existence of any prior incumbrance, it could not be said that although B. had acted as solicitor for the parties in the previous mortgage transactions, notice of any prior charge affecting the property had come to his knowledge as the solicitor of E. in the mortgage transaction of June, 1875. *In re* COUSINS - - - - 671

9. —— *Transferee—Estoppel—Indorsed Receipt.*] On the 10th of February, 1879, the Plaintiffs mortgaged to B. for £250 their equitable interests in a sum of stock, and also certain policies of assurance. By the mortgage deed they acknowledged the receipt of £250, and they also signed a receipt for that sum indorsed on the mortgage deed. On the 11th of March, 1879, B. transferred the mortgage to H., who gave full value for it as a mortgage for £250, and had no notice that the Plaintiffs had not received that sum. The Plaintiffs brought their action, alleging that they had only received £91 instead of £250, and asking redemption on payment with interest of what they had actually received. The Court considered that the evidence would have been sufficient to entitle the Plaintiffs to a judgment on that footing as against B.:—But *held*, that as against H., who had no notice that the whole £250 had not been advanced, the account must be taken on the footing of its having been advanced; for that, in the absence of any circumstances to cause suspicion, he was entitled to rely on the acknowledgment in the mortgage deed and the indorsed receipt, and had a better equity than the Plaintiffs, who, by leaving the documents in the hands of B., had enabled him to commit a fraud. BICKERTON *v.* WALKER - C. A. 151

—— Company—Register - - - 226
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—— Partnership—Surviving partner - 324
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MORTMAIN—Lapsed bequest—Exoneration of personal estate - - - 56
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—— Power of selection given to trustees - 113
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NEGLIGENCE—Solicitor - - - 346
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NEXT FRIEND—Infant - - - 237
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—— Married woman—Costs - - 532
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NEXT HEIR—Gift to - - - 130
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NOTICE—Application under Lunacy Regulation Act - - - - - 160
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—— Mortgage—Priority—Solicitor - 671
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PAYMENT INTO COURT - - - 52
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PAYMENT OUT OF COURT - - 499
See PRACTICE. 10.

—— Lands Clauses Act - - - 607
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PARTITION ACTION—*Motion for Judgment in default of Pleading—Infant Defendants—Evidence.*] On a motion for judgment in default of pleading by the Plaintiffs in a partition action, some of the Defendants being infants:—*Held*, that it was not necessary that any affidavit should be made verifying the statements in the statement of claim. RIPLEY *v.* SAWYER - - 494

—— Costs—Taxation - - - 30
See SOLICITOR. 1.

PARTNERSHIP—*Claim against Estate of Deceased Partner—Subsequent Action against Surviving Partners—Joint and Separate Creditors—Res Judicata—Claim against a Deceased Person—Evidence of Claimant—Corroboration.*] The creditor of a partnership firm, although not strictly a joint and several creditor, has concurrent remedies against the estate of a deceased partner and the surviving partner; and it makes no difference which remedy he pursues first. But it is necessary that the surviving partner should be present at taking the accounts of the estate of the deceased partner, and that the partnership creditor should not come into competition with the separate creditors of the deceased partner.—A father and son being in partnership, became indebted to the Plaintiffs, who were bankers. The son died, and the father brought an action and obtained judgment for the administration of his son's estate. The Plaintiffs carried in a claim for the debt against the separate estate, being at that time unable to prove the existence of a partnership, and were declared entitled to a dividend. Afterwards the father died, and the Plaintiffs having obtained proof of the partnership, brought an action to make his estate liable for the partnership debt:—*Held* (affirming the decision of Bacon, V.C.), that the proceedings in the previous action did not constitute a res judicata or estoppel so as to prevent the Plaintiffs from recovering the debt; but they were put under an undertaking to postpone their dividend on the son's separate estate to the claims of his separate creditors.—*Kendall v. Hamilton* (3 C. P. D. 403; 4 App. Cas. 504) considered.—There is no rule of law which precludes a claimant from recovering against the estate of a deceased person on his own testimony without corroboration; although the Court will in general require such corroboration. *In re* HODGSON. BECKETT *v.* RAMSDALE - C. A. 177

2. —— *Surviving Partner—Mortgage for past Partnership Debt.*] The surviving partner can give a valid charge on property of the partnership, by way of security for a debt incurred by the partners during the life of the deceased partner. *In re* CLOUGH. BRADFORD COMMERCIAL BANKING COMPANY *v.* CURE - - - 324

PATENT—*Infringement—Threatening Legal Proceedings—Private Letter—Injunction—"Circulars, Advertisements, or otherwise"—Ejusdem generis—Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.] Threats "by circulars, advertisements, or otherwise" (Patents, Designs, and Trade-marks Act, 1883, s. 32), include threats by private letter, to the person charged with infringement, the words "or otherwise" not being restricted, on the ejusdem generis principle, to "or other means such as circulars or advertisements."—The solicitors to the Defendants, a company, sent a letter to the Plaintiffs, another company, alleging an infringement of patents claimed by the Defendants, and stating that unless the Plaintiffs forthwith discontinued the infringement legal proceedings would be taken. The Defendants not having followed up the letter by legal proceedings, the Plaintiffs brought an action for an injunction, under sect. 32 of the Patents, Designs, and Trade-marks Act, 1883, to restrain them from making or continuing threats of legal proceedings. The Defendants in their statement of defence alleged that the Plaintiffs had infringed the patents, but afterwards, by amendment, struck out the allegation:—*Held*, that the Plaintiffs were entitled to a perpetual injunction, with costs. DRIFFIELD AND EAST RIDING PURE LINSEED CAKE COMPANY *v.* WATERLOO MILLS CAKE AND WAREHOUSING COMPANY [638

2. —— *Prior Publication—Foreign Treatise—Public Library—British Museum.*] A French treatise was placed in the British Museum library in 1863. The museum catalogue is kept with reference to authors' names; books are arranged according to subject matter; readers can under guidance search for books on particular subjects:—*Held*, there was no prior publication in England of matter contained in the treatise, so as to avoid a patent taken out in 1876. OTTO *v.* STEEL [241

3. —— *Practice—Motion for Judgment—Rules of Supreme Court*, 1883, *Order XXXII., r.* 6—*Patent—Infringement—Admission of Infringement in Defence—Damages—Inquiry.*] Where in an action for infringement of a patent, the Defendant in the defence admitted certain instances of infringement, but denied that he had committed any others, and the Plaintiff thereupon moved for judgment upon the admissions in the pleadings:—*Held*, that the Plaintiff was entitled to an inquiry as to damages arising from the admitted infringements only. UNITED TELEPHONE COMPANY *v.* DONOHOE - - - C. A. 399

PER STIRPES—Per capita - - - 685
See WILL. 7.

PETITION—Winding-up - - - 644
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See SETTLED LAND ACT. 2.

POWER—*Revocation and New Appointment—Successive Appointments—Priority.*] By deed of October, 1860, the donee of a power of appointing £6000 amongst his children, irrevocably appointed £500 to his daughter B., and subject to revoca-

POWER—*continued.*

tion, appointed the £5500 residue to his daughter C.—By a subsequent deed the appointment of £5500 was revoked, and the hereditaments subject to the power were charged with £1600 to C. and £3900 to B., in lieu of the £5500 charged by the first deed, and "subject and without prejudice to the trusts for raising the £500," trusts for raising the £1600 and £3900 were declared. This deed contained a power of revocation and new appointment, confined, however, to the £3900. By a subsequent deed the appointment of £3900 was revoked and that sum was appointed between B. and C. in the proportions of £300 to B. and £3600 to C., in addition to the sums of £500 and £1600 then respectively remaining charged thereon—and it was directed that all the sums raisable under the trusts of the term under the three deeds, should be charged and chargeable on the property pari passu and without priority:—*Held*, that the £500 irrevocably appointed by the first deed had priority over the other charges, and that this priority was unaffected by the direction that the charges should rank pari passu and without priority; and accordingly that, subject to any question as to election, the £500 had priority, and that the several charges amounting to £5500 stood subsequent to the £500, but inter se ranked pari passu. Wilson *v.* Kenrick - - - **658**

2. —— *Will—Power to appoint to Husband and Children—Appointment in favour of Objects of Power—Death of one Child—Invalid Appointment by Codicil—Revocation by Codicil.*] Testator by will, who said his estate would realize at least £10,000, wished £4000 to be invested on trust for his sister, A. B., for her life. At her death the principal might be divided between her husband, if surviving, and children as she might by will determine. After giving other legacies, the testator bequeathed the remainder to the children of J. F. A sum of £4000 was invested in consols and transferred into Court.—A. P. by will gave all the residue of her property, including the sum of £4000 left to her by the testator, and over which she had a disposing power, to her husband and children in equal shares. One son after the date of the will died, leaving two children, and by a codicil made afterwards A. P. bequeathed the share which would have gone to him in trust for his children. On petition by the husband and surviving children for sale of the trust fund and payment of the proceeds to them:—*Held*, that the invalid appointment by the codicil did not operate as a revocation pro tanto of the gift by the will to the class, and that the husband and surviving children were entitled to the whole of the fund. Duguid *v.* Fraser - - - - **449**

3. —— *Will—Residuary Gift.*] A testatrix having a testamentary power of appointment over a trust fund in favour of her children only, purported by her will to appoint to three of her children, including F. and B., one-fourth each, and the remaining fourth to a grandchild, not an object of the power: and "all the rest, residue, and remainder of my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, and over which I have any power of disposal by this my will, I give and bequeath

POWER—*continued.*

the same unto and equally between my said sons F. and B., share and share alike":—*Held*, that the residuary gift operated as an appointment to F. and B. of the one-fourth badly appointed to the grandchild. *In re* Hunt's Trusts - **308**

4. —— *Will—Vesting—Postponement of Enjoyment of Principal—Interim Gift of Income—Appointment to Second Set of Trustees—Acquiescence.*] Property was assigned to trustees in trust for S. for life, and after her death to such of her issue as she should by will appoint. S. by her will appointed two-fifths of the property to two trustees, of whom N. was the survivor, in trust to pay the income to her son till he should attain the age of forty years, and then in trust for her son, his executors and administrators; provided that in case her son should assign his share in the property, then the appointment for his benefit should be void, and the two-fifths should be held in trust for the other objects of the power. The son died under the age of forty without having assigned his share, leaving a will of which B. was executor. After the death of S., L. and N. were appointed trustees of the original settlement. N. afterwards (with the consent of the son's executor) obtained possession of the son's share. Subsequently N. misappropriated the fund.—The persons beneficially interested under the son's will recovered judgment against B. for wilful default in allowing the property to remain in N.'s hands; and B. being dead, his executor brought an action against L. to make him liable for the loss of the fund:—*Held*, by North, J., and the Court of Appeal, on the construction of the will of S., that the beneficial interest in two-fifths of the property vested absolutely in her son and passed by his will.—*Held*, by North, J., that S. had power to appoint the property to trustees for her son, and that as he took the whole beneficial interest the trustees of the settlement had no duties to perform and were justified in handing over the property to N. as the surviving trustee of the will, and that L. was not liable for having allowed it to remain in N.'s hands.—*Held*, by the Court of Appeal, that inasmuch as the son of S. had the absolute interest in the fund, and B., his executor, had consented to its being paid to N., neither B. nor his personal representative could recover against L., the trustee of the settlement, on the ground of wilful default.—But whether in a suit by beneficiaries under the son's will the trustees of the settlement would be held to have been justified in handing over the property to the trustees of S.'s will, *quære.*—*Busk* v. *Aldam* (Law Rep. 19 Eq. 16) recognised. Scotney *v.* Lomer [C. A. **380**

—— Consent to exercise of—Committee of lunatic *See* Lunatic. 1, 2. [**161, 164**

—— Defective execution—Equitable right **596** *See* Settlement. 3.

PRACTICE—*Amendment — Specific Performance —Defence and Counter-claim—Leave to amend—Joinder of Causes of Action—Claim for Recovery of Land—New Case—Delay—Rules of Supreme Court*, 1883, *Order* XVIII., *r.* 2.] In an action for specific performance of an agreement to grant the Plaintiff, who was in possession, a lease of a brickfield, the Defendant delivered a defence admitting

PRACTICE—*continued.*

the agreement and expressing his readiness to perform it; he also counter-claimed for sums alleged to be due for rent under the agreement and labour and materials supplied to the Plaintiff in connection with the property. Three months after joinder of issue, and after notice of trial, the Defendant applied by summons under Rules of Supreme Court, 1883, Order XVIII., rule 2, for leave to amend his defence and counter-claim, and to join therewith a claim for the recovery of the land.—Summons dismissed with costs on the grounds of (1) new case, and (2) delay. CLARK *v.* WRAY - - - - - - 68

2. —— *Appeal — Injunction — Bankruptcy.*] Judgment having been given restraining the Defendants from making, selling, or using instruments of a certain construction, as being an infringement of the Plaintiffs' patent, and ordering delivery up of all instruments so constructed, the Defendants appealed, but before the appeal was ready for hearing became bankrupt:—*Held*, that the Defendants, though bankrupts, had still such an interest in being relieved from the injunction as entitled them to proceed with the appeal on giving security for costs.—An order was made dismissing the appeal unless within a certain time the bankrupts gave security for costs, or the trustee in bankruptcy made himself a party to the proceedings. UNITED TELEPHONE COMPANY *v.* BASSANO - - - - - 630

3. —— *Appeal—Time—Foreclosure—Rules of Supreme Court.* 1883, *Order LVIII. r.*, 15.] Under Rules of the Supreme Court, 1883, Order LVIII., r. 15, an order in the ordinary form of a foreclosure judgment, made under Order XV., is, for the purpose of an appeal from it, to be treated as a final order, and it can be appealed from at any time within a year, and the appeal can be heard though, since the notice was served, the foreclosure has been made absolute. SMITH *v.* DAVIES [C. A. 595

4. —— *Appeal—Time—Motion in Court to vary Order made by Judge of Chancery Division in Chambers—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 50—*Rules of Supreme Court*, 1883, *Order LVIII., r.* 15.] In an administration action by next of kin against administratrix, the conduct of which had been given to a creditor, an order was made, on the application of the administratrix, by the Judge personally in Chambers, directing the taxation of the costs of the Plaintiff, the Defendant, and the creditor, and the application of the funds in Court in payment of a debt and then pro tanto of the costs when taxed, priority being given to the costs of the Defendant. Liberty was also given to any of the parties to apply in Chambers as to the getting in of an outstanding asset, and generally:—*Held*, that this was an interlocutory order, and that a notice of motion in Court to vary it, given after the expiration of twenty-one days, was too late. *In re* LEWIS. LEWIS *v.* WILLIAMS - - - C. A. 623

5. —— *Costs—Next Friend—Married Women—Restraint on Anticipation—Order against Separate Estate.*] A married woman, by her next friend, having brought in 1882 an action for administration of a trust fund, to the income of which she was entitled for her separate use without power of anticipation, the Court on further consideration in 1884, held the action to have been unnecessary and improper, and the next friend was ordered to pay the Defendants' costs.—The Defendants being unable to find the next friend, an order was made by Vice-Chancellor Bacon giving the trustees liberty to retain the costs out of the income of the trust fund already due and to become due to the married woman.—*Held*, on appeal, that no such order could be made, for that the Court has no jurisdiction to disregard the restraint on anticipation on the ground that it appears to the Court to be just to do so; and that no income which did not accrue due till after the act on which the claim against the separate estate depended, viz. the improper institution of the suit, could be attached to meet the costs.—Whether, if the Plaintiff had been suing under the Married Women's Property Act, 1882, without a next friend, the order could have been supported, *quære.*—*In re Andrews* (30 Ch. D. 159) observed upon.—The appeal being allowed with costs, *held*, that the costs must be set off against the costs which the next friend had been ordered to pay, although the notice of appeal did not purport to be given through the next friend, for that so long as he remained on the record as next friend the proceedings on behalf of the Plaintiff must be taken as carried on by him. *In re* GLANVILL. ELLIS *v.* JOHNSON - - - C. A. 532

6. —— *Hearing in Camerâ.*] An appeal from an injunction to restrain the Defendant from disclosing confidential information was ordered to be heard in private without the consent of the Defendant, the Plaintiff stating that a public hearing would defeat the object of the action, and make success on the appeal useless to him. MELLOR *v.* THOMPSON - - - - C. A. 55

7. —— *Injunction—Arbitration—Unauthorized use of Name—Jurisdiction—Lands Clauses Consolidation Act*, 1845.] The lessee of a ferry served a notice on a railway company on behalf of himself and his lessors claiming compensation for injury to the ferry, and requiring the dispute to be submitted to arbitration under the Lands Clauses Act. The lessors had not given authority to use their names; the Act of the railway company provided for compensating the lessors of the ferry but did not mention their lessee; and the notice claimed one lump sum without distinguishing the interests of the lessors and the lessee. The railway company brought an action for an injunction to restrain the lessee from proceeding to arbitration under the notice:—*Held*, by Chitty, J., that a proceeding in the name of a person who had given no authority ought to be stayed, and that an injunction ought to be granted, the unauthorized use of the name of the lessors distinguishing the case from *North London Railway Company* v. *Great Northern Railway Company* (11 Q. B. D. 30):—*Held*, on appeal, that though the Court in which an action is brought has jurisdiction to stay proceedings in it if it has been brought without authority, the Court has no general jurisdiction to restrain persons from acting without authority, and that an injunction could not be granted to restrain a person from taking proceedings out of Court in

PRACTICE—*continued.*

the name of a person who had given no authority to use it. London and Blackwall Railway Company *v.* Cross - - - **C. A. 354**

8. —— *Interrogatories—Discovery—General Allegation of Fraud—Agent—Pleading—Rules of Supreme Court*, 1883, *Order* xix., *r.* 6; *Order* xxxi., *r.* 20.] The Plaintiff alleged that he had employed the Defendant as a stockbroker, but that the Defendant had in many of the transactions dealt with himself as principal, and had also charged the Plaintiff with moneys not paid. The Plaintiff delivered interrogatories asking for the particulars of the dealings on behalf of the Plaintiff and the names of the persons with whom the Defendant had dealt and the amounts paid. The Defendant refused to answer on the ground that the Plaintiff was not entitled to this information until after decree:—*Held*, by Cotton and Bowen, L.JJ. (dubitante Fry, L.J.), that though there were no particulars of the frauds alleged, the Plaintiff was entitled to discovery in order to enable him to give details of the frauds alleged:—Per Bowen, L.J., Order xix., rule 6, is a rule of pleading only.—*Whyte* v. *Ahrens* (26 Ch. D. 717) discussed. Leitch *v.* Abbott - **C. A. 374**

9. —— *Payment into Court—Admission—Failure to answer Affidavit—Rules of Supreme Court*, 1883, *Order* xxxii., *r.* 6.] The Defendant, one of the trustees of a settlement, in letters written to the Plaintiff, his co-trustee, before the commencement of this action for the administration of the trusts, admitted having received £300, part of the trust funds, and invested it in an unauthorized way. The Plaintiff, after the Defendant had appeared in the action, took out a summons to have the £300 brought into Court, and made an affidavit deposing that he had paid the money to the Defendant, and stating the admissions contained in the Defendant's letters as to its application. The Defendant did not answer this affidavit or adduce any evidence. Chitty, J., ordered the money into Court on the ground that the letters were a sufficient admission within Order xxxii., r. 6. The Defendant appealed:—*Held*, that as the Defendant had not met the affidavit, there was a sufficient admission that the money was in his hands, and that the appeal must be dismissed.—*Freeman* v. *Cox* (8 Ch. D. 148) approved and followed.—Per Fry, L.J., whether the letters were not a sufficient admission within Order xxxii., rule 6, *quære*. Porrett *v.* White [**C. A. 52**

10. —— *Payment out of Court—Rules of Supreme Court*, 1883, *Order* lv., *r.* 2, *sub-r.* 1.] The Court refused to order payment out of Court of a sum over £1000 on summons.—*In re Brandram* (25 Ch. D. 366) dissented from. *In re* Rhodes [**499**

11. —— *Sale by Court—Rules of Supreme Court*, 1883, *Order* li., *r.* 1; *Order* lv., *r.* 3—*Originating Summons—Approval of Sale by Court—Infant's Real Estate.*] Under r. 3 (*f*) of Order lv. the Court can only approve of a sale which the executors or trustees of the will or deed to which the originating summons relates could have made themselves.—Under r. 1 of Order li. the Court has power to order a sale of real estate only when it is necessary or expedient for the purposes

PRACTICE—*continued.*

of the action before it that the property should be sold.—No new power to order a sale is conferred. *In re* Robinson. Pickard *v.* Wheater [**247**

12. —— *Security for Costs—Appeal—Appeal from Order to strike Solicitor off the Roll.*] A solicitor who appealed from an order striking him off the roll, and directing an account and payment of moneys due from him to clients of his who obtained the order, was directed to give security for costs, it being shewn that he was in insolvent circumstances.—Whether security for costs would have been required if the solicitor had appealed only against an order striking him off the roll, *quære*. *In re* Strong - - - **273**

13. —— *Security for Costs—Residence Abroad.*] The Plaintiff obtained an injunction to restrain the Defendants from parting with goods alleged to bear improperly the Plaintiff's trade-mark. The Defendants, who were shipowners, had no interest in the goods, which had only been put in their hands for transmission. S., a resident in America, who claimed to be owner of the goods, served notice of motion that he might be at liberty to reship the goods to a foreign port, and that if necessary he might be added as a defendant to the action:—*Held* (affirming the order of Bacon, V.C.), that S. must give security for the costs of the motion, for that whatever his position as to costs might be if and when he was made a defendant, he must on this motion be treated as a person resident abroad coming forward to enforce a right, and stood in the position of a plaintiff. Apollinaris Company *v.* Wilson - - **C. A. 632**

14. —— *Security for Costs—Trustee in Bankruptcy—Insolvent Plaintiff.*] The Court will not require security for costs to be given by a plaintiff who sues as trustee in bankruptcy even where he is in insolvent circumstances.—*Denston* v. *Ashton* (Law Rep. 4 Q. B. 590) approved.—The observations of Pearson, J., in *Pooley's Trustee in Bankruptcy* v. *Whetham* (28 Ch. D. 38) dissented from. Cowell *v.* Taylor - - **C. A. 34**

15. —— *Setting aside Judgment—Rules of Supreme Court*, 1883, *Order* xxvii., *r.* 15.] The Defendant to an action disobeyed an order to produce documents for inspection; her defence was struck out, and judgment given against her in default of a defence. There was evidence that her solicitor had explained to her the effect of the order for production and the consequence of disobeying it. The Court refused to set aside the judgment on any terms. Haigh *v.* Haigh [**478**

16. —— *Staying Proceedings—Non-payment of Costs—Trial—Contempt.*] Where a plaintiff is in contempt through breach of an order for payment of the costs of an application in the action, the Court will, at the instance of the defendant, upon the action being called on for trial, stay all further proceedings until the plaintiff has cleared his contempt. An application for payment prior to the case being called on is not necessary. *In re* Neal. Weston *v.* Neal **437**

17. —— *Staying Proceedings—Non-payment of Costs.*] Where a party prosecuting proceedings is in contempt for not paying costs, the

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proceedings will be stayed. *In re* YOUNGS. DOGGETT *v.* REVETT - - - - - 239
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SETTLED LAND ACT—*Mineral Lease*—45 & 46 *Vict. c.* 38, *ss.* 11, 63—*Setting aside part of Rent —Tenant for Life impeachable for Waste—Person entitled for Life to Income of Proceeds of Land subject to Trust for Sale and to Rents until Sale.*] A person who is entitled for his life to the income of the money to arise from the sale of settled land and to the rents and profits of the settled land until sale, although to be deemed a tenant for life under sect. 63 of the Settled Land Act, 1882, is not, properly speaking, "impeachable for waste in respect of minerals" within the meaning of sect. 11.—Nevertheless, where a lease of unopened minerals is made by such a person under the provisions of the Act, three-fourths of the rents and royalties should be set aside as capital moneys arising under the Act, and the residue only should go as rents and profits.—Order of Bacon, V.C., varied. *In re* RIDGE. HELLARD *v.* MOODY **504**

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2. —— *Person having Powers of Tenant for Life*—45 & 46 *Vict. c.* 38, *s.* 2, *sub-s.* 5; *s.* 56, *sub-s.* 2; *s.* 58, *sub-s.* 1, *cl.* vi. *and* ix.—*Trust for Accumulation—Person not entitled to Possession.*] A testator by will dated in 1883 devised an estate to the use of trustees for a term of 1300 years and subject thereto to his son H. S. for life, with remainders over in strict settlement. The trusts of the term were to raise portions, to pay annuities, H. S. being one of the annuitants, and to apply the residue as a sinking fund to pay off mortgage debts and other charges. It was estimated that the trusts of the term would require from fifteen to twenty years for their fulfilment. The testator directed that the trustees should "during the continuance of the last-mentioned trusts" enter into and hold possession of the rents and profits of the estate "and not deliver the same to any person beneficially interested in any part thereof," and should manage the estate as therein mentioned. Very full powers of management were given to the trustees, provided that when all the trusts of the term should have been fully paid and satisfied the term should cease. He, moreover, gave to the trustees such other powers over the estate as were given to a tenant for life in possession by the Settled Land Act, 1882:—*Held* (affirming the decision of Bacon, V.C.), that H. S. was a person having the power of a tenant for life of the estate within the meaning of sect. 58, sub-sect. 1, cl. ix. of the Settled Land Act, 1882, and that his consent was necessary under sect. 56, sub-sect. 2, to the effectual exercise by the trustees of the powers of sale and enfranchisement contained in the will. *In re* CLITHEROE ESTATE **C. A. 135**

3. —— *Tenant for Life — Persons having Powers of Tenant for Life—Discretionary Trust for Application of Income during Life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 5, 6, 10 (*cl.* i.); *s.* 51; *s.* 58, *sub-s.* 1 (*cls.* vi., ix.).] A trust, although it be to last during the life of A., to apply the rents and profits of an estate for the benefit of A. and of his wife and his children, if any, does not constitute A. or A. and his wife together, a tenant for life of the estate under sect. 2, sub-sect. 6 of the Settled Land Act, 1882, or a person with the powers of a tenant for life under sect. 58 of that Act.—Decision of Pearson, J., affirmed.—The word "possession," in sect. 2, sub-sect. 5, and in sect. 58, sub-sect. 1, is to be read as in antithesis to "remainder" or "reversion."—The words "so entitled," in sect. 2, sub-sect. 6 mean entitled under the direction in the preceding sub-section, i.e. for life. *In re* ATKINSON. ATKINSON *v.* BRUCE - - - **C. A. 577**

SETTLEMENT—*After-acquired Property of Wife —Covenant by Husband that he and his Wife would settle—Recital of Agreement for Settlement—Property afterwards acquired by Wife "for her separate use."*] A marriage settlement contained a recital of an agreement that all such personal estate above a certain value as should during the coverture be given or bequeathed to or otherwise vest in the wife should be settled, and that the husband should enter into the covenant in that behalf thereinafter contained. The corresponding operative part of the deed was a covenant by the husband alone (without the usual words: "It is

SETTLEMENT—*continued.*

hereby agreed") that he and his wife would settle such property, and that until such settlement the husband and wife should stand possessed of the same upon the trusts of the settlement.—The wife as well as the husband executed this settlement, and during the coverture property was given to the wife for her separate use:—*Held*, that the operative words were sufficiently ambiguous to enable the Court to look at the recitals, and that on the whole instrument the wife's after-acquired separate property was bound by the covenant. *In re* De Ros' Trust. Hardwicke *v.* Wilmot [81

2. —— *After-acquired Property of Wife—Covenant to settle—Release by Wife in mistake before Marriage set aside after—Additional Property coming to her thereby.*] By a marriage settlement made in 1859, after a recital that the wife was entitled, amongst other property, to £10,000, part of her share of the residue of a testator's estate, in the hands of the executors of a will and secured by mortgage, this £10,000 was settled, and the husband and wife covenanted for the settlement of all the estate, property, and effects exceeding £300 at one time which the husband and wife, or either of them in her right, should at any time or times subsequent to the marriage and during the coverture become possessed of or entitled to at law or in equity by any means whatsoever. The day before the settlement, the wife, then a spinster and of full age, had executed a general release to the executors of the will of all her claims to the estate of the testator. It subsequently appeared that her share in the residue was greatly in excess of the amount at which it was stated in the release, and on the 10th of February, 1885, while the coverture was still subsisting, an order was made by the Court of Appeal setting aside the release:—*Held*, first, that the covenant did not apply to any personal property (other than the £10,000) to which the wife was entitled at the moment of the marriage; secondly, that as the right to recover anything further in respect of the wife's share of the residue had been barred by the release, and only revived when it was set aside by the order of the Court, the additional residuary property thus recovered must be treated as having come into existence, or at any rate into possession, at the date of the order; and thirdly, that not only the capital sum recovered, but also the income thereon up to the date of the order, must be treated as a lump sum falling in when the release was set aside, and consequently as bound by the covenant. *In re* Garnett. Robinson *v.* Gandy - - 648

3. —— *After-acquired Property of Wife—Volunteer claiming benefit of Covenant—Maxim, "Equity looks on that as done, which ought to be done" — Power — Defective Execution.*] The maxim that Equity looks upon that as done which ought to be done applies only (in cases depending on contract) in favour of persons who are entitled to enforce the contract, and cannot be invoked by volunteers.—By a marriage settlement executed in 1853, certain personal estate was assigned to trustees upon trust in case the husband should die in the lifetime of the wife, and there should be no children of the marriage, to stand possessed

SETTLEMENT—*continued.*

thereof for the wife, her executors, administrators and assigns.—The settlement contained a covenant by the husband and wife that any real estate to which the wife should become entitled, whether in possession, reversion, remainder, or expectancy, or over which she should have an absolute power should be assured to the trustees to be held by them upon the same trusts as the above-mentioned personal estate, or as near thereto as the nature of the property would admit of, and until so assured should be subject to the trusts and enjoyed accordingly. By a deed executed in 1873, certain lands called the Stonehouse property were conveyed to trustees for the wife during the joint lives with restraint on anticipation, remainder to her for life, remainder as she should by deed or will appoint, and in default of appointment to the husband in fee. By a codicil to her will made in her husband's lifetime the wife devised the Stonehouse property to two persons. The husband died in May, 1862, and the wife in the month of June following. She never republished her will or codicils. There were no children of the marriage, and the Stonehouse property was never assured to the trustees on the trusts of the marriage settlement. In an action to administer the real and personal estate of the wife:—*Held*, that the covenant to assure after-acquired property could not be enforced or treated as operative in favour of the heir-at-law, that the declaration of trust annexed to it could not be regarded in his favour as a defective execution of a power which the Court would cure, and that the codicil being a good execution of the power of appointment contained in the deed of 1873, the two devisees therein mentioned were entitled to the Stonehouse property. *In re* Anstis. Chetwynd *v.* Morgan. Morgan *v.* Chetwynd - - - C. A. 596

4. —— *Construction—"Free from all Deductions"—Covenant by Settlor for Payment of a sum of Money during his Life or after his Death—Succession Duty Act* (16 & 17 *Vict. c.* 51), *ss.* 1, 42, 44 *—Legacy Duty Act* (36 *Geo.* 3, *c.* 52), *s.* 6.] The father of a married woman covenanted with trustees for payment to them at such time or times during his life as he should think fit, or within twelve calendar months after his death, of the sum of £10,000 "free from all deductions whatsoever," and for payment to them in the meantime of an annuity of £200, the principal sum and the annuity to be held upon the trusts therein mentioned for the daughter and her family. The covenantor did not pay any part of the £10,000 in his lifetime, but after his death his executor paid to the trustees the full sum of £10,000. The Crown claimed succession duty from the trustees, who paid it, and claimed repayment from the executor on the ground that the £10,000 was to be paid free from all deductions. Both parties agreed that the fund was liable to succession duty, and argued the case on that footing. Bacon, V.C., decided that the fund, and not the covenantor's estate, must bear the duty if payable:—*Held* (affirming the decision of Bacon, V.C.), that if the duty was payable it must be borne by the fund, for that the relation between the trustees and the executor was simply that of creditors and debtor, that the executor was not liable to be called on

SETTLEMENT—*continued.*

by the Crown for the duty, and that when he had paid the £10,000 in full to the trustees, he had discharged his testator's obligation, and was not concerned with the question whether succession duty was payable.—Whether any succession duty was payable on the death of the covenantor, *quære*. *In re* Higgins. Day *v.* Turnell [C. A. 142

5. —— *Construction—Ultimate Limitation to Next of Kin of Wife—Time for ascertaining Next of Kin entitled.*] A testator by his will directed that the shares of his daughters in his residuary estate should be settled, the ultimate limitation, in case a daughter should not leave any child or children who should be living at the decease of the survivor of herself and her husband, being in trust for the person or persons who under the Statutes of Distribution "would on her decease have been entitled thereto in case she having survived her husband and had then died possessed thereof and intestate." A daughter having died without issue, leaving her husband surviving:—*Held*, that her next of kin to take under the ultimate limitation were to be ascertained at the time of her own death, and not at the time of the death of her husband.—*Chalmers* v. *North* (28 Beav. 175) disapproved. Druitt *v.* Seaward. *In re* Ainsworth. Ainsworth *v.* Seaward 234

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SOLICITOR—*Costs—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 2—*General Order, August*, 1882, *r.* 2, *sub-s.* (*c*)—*Partition Action—Costs of Defendants' Solicitors — Conveyancing.*] In a partition action an order was made for the sale of the estate and payment of the costs of all parties out of the proceeds. The Plaintiff, who was the owner of one-fourth of the estate, had the conduct of the sale, and his solicitor was paid his costs in accordance with rule 2, sub-sect. (*a*) of the General Order under the Solicitors' Remuneration Act, 1881:—*Held* (reversing the decision of Bacon, V.C.), that the solicitors of the Defendants, who were the owners of the other three-fourths of the estate, were entitled to be paid the costs of perusing the conveyance and obtaining its execution by their clients under rule 2, sub-sect. (*c*). Humphreys *v.* Jones - C. A. 30

2. —— *Lien—Delivery up of Papers—Rules of Supreme Court*, 1883, *Order* L., *r.* 8—*Promotion Expenses—Statutory Debt.*] The Court has jurisdiction, upon payment into Court, or giving security for a sum sufficient to answer the solicitor's demand, to order before taxation delivery up by a solicitor of the client's papers, where retention by the solicitor of the papers on which he claims a lien would embarrass the client in the prosecution or defence of pending actions.—*Quære* (per Lindley, L.J.), whether the jurisdiction is not extended by Order L., r. 8.—This lien

SOLICITOR—*continued.*

is confined to what is due to the solicitor in that character, and does not extend to general debts. Accordingly the lien of the solicitor of a railway company for his costs does not include costs incurred in relation to the promotion of the company before incorporation, such costs by the usual clause in the Act having been made a statutory debt to be paid by the company. *In re* Galland [296

3. —— *Negligence—Summary Jurisdiction—Omission to procure Investment of Purchase-money paid into Court—Damages—Costs—Liability of Solicitor to a Person who was not his Client.*] An order was obtained by the solicitor for the Plaintiff that the purchaser of property, sold under an order of the Court in an action, should pay his purchase-money into Court, and that the money when paid in should be invested in Consols. The Plaintiff had the conduct of the sale. The money was paid into Court by the purchaser, but the Plaintiff's solicitor omitted to leave with the Paymaster the necessary request for its investment, and consequently the investment was not made. On the further consideration of the action it was ordered that the balance of the purchase-money, after the payment of certain costs, should be paid to the receiver in the action, in part satisfaction of a balance due to him. The carriage of the order was given to the receiver, and he then discovered that the purchase-money had not been invested. He took out a summons, asking that the Plaintiff's solicitor might be ordered to pay to him the amount of interest lost by the non-investment of the purchase-money:—*Held*, that the solicitor, as the officer of the Court having the conduct of the sale, was responsible not only to his client but to the Court for the due discharge of his duty, and that he must make good to the person entitled the loss of interest, but that he was entitled to a set-off in respect of a gain which had resulted from a fall in the price of Consols between the time when the investment ought to have been made and the date of the order on further consideration:—*Held*, that this liability could be enforced by summons in the action.—On allowing the set-off, it appeared that the amount to be paid by the solicitor would be only £5 8*s.* 6*d.*:—*Held*, that the solicitor must pay the costs of the summons. Batten *v.* Wedgwood Coal and Iron Company - - - 346

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SPECIFIC PERFORMANCE—*Practice—Defaulting Defendant—Further Consideration—Form of Order.*] Form of order on further consideration in an action for specific performance by vendor where the Defendant has persistently endeavoured to evade the judgment. MORGAN *v.* BRISCO 216
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TENANT IN TAIL—*Disentailing Deed—Resettlement — Mistake — Rectification — Jurisdiction — Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *ss.* 40, 47.] The Court is not prohibited by the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), s. 47, from exercising its ordinary jurisdiction to rectify, on the ground of mistake, a deed of resettlement which has been enrolled as a disentailing assurance under the Act:—Judgment of Bacon, V.C., reversed. Hall-Dare *v.* Hall-Dare [251

TENANT PUR AUTRE VIE—*Practice*—6 *Anne, c.* 18 [*In Revised Ed. Statutes, vol. ii., p.* 188, *referred to as c.* 72]—*Production of Cestui que vie—Tenant for Life—Wife of Tenant for Life in Possession—A Person having an Interest.*] Under the statute 6 Anne, c. 18, the Court has power to make an order for the production of a cestui que vie as well upon a person having an interest determinable on a life, as on a person having an estate pur autre vie strictly so called. *In re* Thomas Stevens - - - - 320

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TRADE-MARK—*Distinctive Device—Pictorial Representation—Trade-marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *s.* 10.] A pictorial representation of an article is not a proper trade-mark for such article. *In re* James's Trade-mark. James *v.* Parry - - - - 340

2. —— *Registration of Assignment—Right to sue.*] Where a trade-mark has been registered, an assignee of the registered proprietor can bring an action to prevent the use of the trade-mark, without having registered the assignment. Ihlee *v.* Henshaw - - - - - 323

3. —— *Registration—Goods of Plaintiff known by his Mark to the Public—Infringement of Plaintiffs' Mark by User by Defendant of his Mark on Goods similar in Character—Fraud—Rectification of Register.*] The Plaintiffs in 1876 registered a trade-mark for condensed milk and certain other specified articles. The mark consisted of a figure representing a milk-maid or dairy-maid, and their goods became known as "Milk-maid" brand or "Dairy-maid" brand.—In 1883 the Defendant registered for "butterine and other fatty substances used as food or as ingredients in food" a mark which did not resemble the Plaintiffs' mark, but had as part of it the words "Dairy-maid":—*Held*, that the registration of the Defendant's mark must be rectified by adding the words "other than condensed milk and" the other

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articles specified by the Plaintiffs. The Defendant having sold condensed milk under his trade-mark an injunction was also granted. Anglo-Swiss Condensed Milk Company *v.* Metcalf. *In re* Metcalf's Trade-mark - - 454

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TRUST—*Transfer of Stock into Joint Names—Resulting Trust—Presumption—Intention to benefit.*] The Plaintiff, a widow, in the year 1880, caused £6000 Consols to be transferred into the joint names of herself and the Defendant, who was her godson. She did so with the express intention that the Defendant, in the event of his surviving her, should have the Consols for his own benefit, but that she should have the dividends during her life; and she had previously been warned that if she made the transfer she could not revoke it. The first notice the Defendant had of the transaction was a letter from the Plaintiff's solicitors about the end of 1882 claiming to have the fund re-transferred to the Plaintiff:—*Held*, that the legal title of the Defendant as a joint tenant of the stock was complete, although he had not assented to the transfer until he was requested to join in re-transferring the stock, for that the legal title of a transferee of stock is complete without acceptance.—A transfer of property to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of the transfer.—*Held*, further, that the Plaintiff could not claim a re-transfer on equitable grounds, the evidence clearly shewing that she did not, when she made the transfer, intend to make the Defendant a mere trustee for her except as to the dividends:—*Held*, therefore (affirming the decision of Mr. Justice Pearson), that the Plaintiff was not entitled to have the stock re-transferred to her. Standing *v.* Bowring - - - - - 282
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TRUSTEE—*Breach of Trust—Improper Investments—Liability of Husband for his Wife's Breach of Trust—Right to Indemnity by co-Trustee.*] A husband's liability for his wife's breaches of trust extends to breaches of trust arising from negligence, and is not confined to losses caused by her active misconduct.—Where there are two trustees and the management of the trust is left in the hands of one, and the acting trustee commits a breach of trust, the passive trustee is not entitled to an indemnity from the acting trustee, unless there are some special circumstances, as where the acting trustee is the solicitor for the trust, or has derived a personal benefit from the breach of trust.—*Lockhart* v. *Reilly* (25 L. J. (Ch.) 697) and *Thompson* v. *Finch* (8 D. M. & G. 560) distinguished. Bahin *v.* Hughes - C. A. 390
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TRUSTEE ACTS—*Practice—New Trustees—Petition for Appointment of—Dispensing with Service—Verification of Consent of Trustee to act—Rules of Supreme Court, December*, 1885, *Order* XXXVIII., *r.* 19 *a.*] The persons entitled to the residuary estate of a testator presented a petition for appointment of new trustees of his will in the place of the original trustees, one of whom had died, and the other was a lunatic. The petition was served on three of the four persons who were entitled to the proceeds of sale of a real estate devised on trusts for persons who took no interest in the residue, but the fourth was resident in Australia, and was not served:—*Held*, that service on the cestui que trust in Australia might be dispensed with.—The signature of a new trustee to his consent to act must in Lunacy be verified by affidavit according to the old practice; the Order XXXVIII., r. 19 a, not applying to proceedings in Lunacy. *In re* WILSON - 522

2. —— *New Trustees—Vesting Order—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *ss.* 2, 5, 32, 34—"*Person of unsound mind*"—*Trustee incapable from Age and Infirmity.*] The clause in sect. 2 of the Trustee Act, 1850, which declares that the expression "person of unsound mind" shall mean "any person, not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs," must be construed as referring to a person who, although not found a lunatic, is nevertheless in such a state of mind as to render him liable to be so found if an inquisition were held upon him.—The case of a trustee who is from great age and its infirmities practically incapable of transacting business (though not otherwise of unsound mind) is within the 32nd section of the Trustee Act, 1850. *In re* PHELPS' SETTLEMENT TRUSTS [C. A. 351

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See LANDS CLAUSES ACT. 2.

VENDOR AND PURCHASER—*Costs of investigating Title—Failure of Vendor to shew Title—Vendor and Purchaser Act*, 1874—*Summons—Jurisdiction.*] On making an order, upon a summons by a purchaser under the Vendor and Purchaser Act, 1874, declaring that the vendor has not shewn a good title to the property, the Court has jurisdiction to order the vendor to pay the purchaser's costs of investigating the title, and to charge them upon the vendor's interest in the property.—*In re Higgins and Hitchman's Contract* (21 Ch. D. 95) followed. *In re* YEILDING AND WESTBROOK - - - - 344

2. —— *Interest on Purchase-money—Wilful Default—Vendor and Purchaser Act*, 1874—*Jurisdiction.*] Conditions of sale provided that the purchase was to be completed by the 8th of September, and that "if from any cause whatever other than wilful default on the part of the vendor" completion of the purchase was delayed beyond that day the purchase-money was to bear interest from that day to the day of actual payment. The property was in mortgage, and the draft conveyance was not returned approved by the mortgagees to the purchasers until the 6th of September. On the 8th of September the engrossment was sent to the vendor's solicitors, but the vendor had gone abroad for his autumn holiday on the 6th of September, and the engrossment executed by him was not returned until the 18th of September. The mortgagees were also out of town, and the vendor's solicitors declined to incur the expense of a special messenger to procure execution by them. The purchase was not completed until the 14th of October:—*Held*, on summons by the purchasers under the Vendor and Purchaser Act, 1874, s. 9, for recovery of interest on the purchase-money paid by them under protest, that by his going abroad two days before the time known by him to have been fixed for completion of the purchase, there had been so far "wilful default on the part of the vendor" within the exception contained in the conditions of sale, that the purchasers were entitled to recover out of the interest paid by them a sum proportionate to the delay.—*Quære*, whether the Court has jurisdiction upon summons under sect. 9 of the Vendor and Purchaser Act, 1874, to order interest which has been erroneously paid by a purchaser to be repaid to him. *In re* YOUNG AND HARSTON'S CONTRACT - C. A. 168

VESTING ORDER - - - - 351
See TRUSTEE ACTS. 2.

VOLUNTARY WINDING-UP—Commencement of winding-up - - - - 78
See COMPANY. 13.

VOLUNTEER—Settlement—Power to enforce covenant - - - - 596
See SETTLEMENT. 3.

WAY—*Easement—Way of Necessity—Land taken compulsorily—Public Undertaking.*] A. and B. had respectively acquired interests under building agreements in two adjoining plots of land. A local board under their compulsory powers took half an acre, part of A.'s holding, and five acres, part of B.'s holding, for the purpose of sewage works, the necessary proceedings having been taken as against A. and B. in respect of their several interests, and against the reversioner C. in respect of the whole five and a half acres. The only way to the land taken was a warple way over other part of A.'s building plot, which, for thirty years before the building agreements had been used by the occupiers of both A.'s and B.'s land for purposes of cultivation, and since the building agreements had been used by A. for his own building purposes:—*Held*, that the local board had a right of way over the warple way for all necessary purposes in connection with the sewage works. SERFF *v.* ACTON LOCAL BOARD [679

WILFUL DEFAULT — Interest on purchase-money - - - - - 168
See Vendor and Purchaser. 2.

WILL—*Attesting Witness—Incapacity of Legatee—Wills Act* (1 *Vict. c.* 26), *s.* 15—*Substitutional Gift—Acceleration of Interests.*] A testator devised and bequeathed all his real and personal estate to his wife for life, and after her death to be equally divided between such of his children as should be living at her death; and in case of any of the above-mentioned children dying before his wife leaving children, such children were to take their parent's share. And in the event of any of his daughters being married at his wife's decease, it was his will that such proportion as they might be entitled to should be left to them and their children exclusively, and should in no way be controlled by their husbands.—At the death of the testator's widow one of his daughters was living who had several children. Her husband was an attesting witness to the will, and consequently the gift to her was void under sect. 15 of the Wills Act:—*Held*, that the daughter's children were not to be disappointed by her disability, but took an immediate interest in her share as tenants in common. *In re* Clark. Clark *v.* Randall - - - - 72

2. —— *Attesting Witness—Charge of Debts—Wills Act* (1 *Vict. c.* 26), *s.* 15—*Rules of Supreme Court*, 1883, *Order* lv., *r.* 2, *sub-r.* 16—*Costs.*] A., being entitled to a life interest in a fund over which she had a testamentary power of appointment, borrowed, in 1871, from B. £350 on the security of a covenant that £1250 should be paid one month after her death. She died in 1884, having by her will appointed executors, and directed payment of her debts, and also that C., one of her executors (a solicitor), should be entitled to charge and receive payment for all professional business to be done by him under the will. C. was one of the attesting witnesses.—In an administration action by B. on behalf of himself and all other creditors, the estate being insolvent:—*Held*, 1, that the executors could not be deprived of the costs out of the assets, of a cross-examination for the purpose of investigating B.'s claim, though no proceedings to set aside the deed were subsequently taken.—2. That C., as an attesting witness, was prohibited by the Wills Act, s. 15, from receiving that which was not a debt of which payment could be enforced at law, but a beneficial gift, which could only be claimed by virtue of the direction in the will; and (*semble*) that even if he had not attested the will the direction authorizing him to charge for his professional services operated by way of bounty only, and, the estate being insolvent, could not take effect as against the creditors.—Although applications for an order on further consideration are by Rules of the Supreme Court, 1883, Order lv., r. 2, sub-r. 16, where the estate is insolvent, business to be disposed of in Chambers, a plaintiff will not be disallowed his costs of further consideration in Court where the distribution of the insolvent estate gives rise to questions of difficulty. *In re* Barber. Burgess *v.* Vinnicome - - - 665

3. —— *Blanks left by Testatrix — Will on Printed Form—Gift "unto to and for own use and benefit absolutely"—Appointment of Executor—No Next of Kin—Presumption—Parol Evidence—Claim by Crown—Admissibility of Evidence of Intention of Testatrix—Executor entitled absolutely.*] Testatrix, who made her will on a printed form, after giving certain legacies, gave all her estate real and personal "unto to and for own use and benefit absolutely," and then appointed C. W. C. to pay all her debts, &c., and to be executor of her will. The Chief Clerk certified that the testatrix was illegitimate, and that she left no issue or next of kin. The Crown and the executor claimed the residue, and the executor tendered evidence to prove that the intention of the testatrix was, that he should take the residue, if any, for his own benefit:—*Held*, that, under the peculiar circumstances, parol evidence was admissible to rebut the presumption against the executor arising from the blanks in the will, and that the executor, subject to the payment of costs, was entitled for his own benefit to what should remain. *In re* Bacon's Will. Camp *v.* Coe 460

4. —— *Charge of Debts and Legacies—Exoneration of Personal Estate—Lapsed Bequest.*] A testatrix devised her real estate to trustees in trust for sale, and directed them out of the proceeds to pay her funeral and testamentary expenses, debts, and legacies, and pay the residue to a class of persons. She then directed her trustees, who were also her executors, to sell her leaseholds, and if the sale moneys of the real estate were insufficient to pay her debts, funeral and testamentary expenses, and legacies, to apply so much of the proceeds of the sale of the leaseholds as should be sufficient for that purpose, and to pay the residue, or if no part was required for the above purpose the whole, of the proceeds to another class of persons. She then bequeathed to her trustees "all my personal estate," upon trust to call it in and convert it into money, and after payment of the expenses of such calling in and conversion, to pay the proceeds to the churchwardens of C. for charitable purposes. Part of the personal estate consisted of a mortgage debt, as to which the charitable bequest failed, and the Crown became entitled, there being no next of kin:—*Held*, that there was upon the will a sufficient indication of intention that the general personal estate should be exonerated from debts, funeral and testamentary expenses, and legacies out of the real estate; and if that was insufficient, out of the leaseholds, but that this right to exoneration failed as regarded the property which went to the Crown, and that there was no distinction in this respect between the freeholds and leaseholds:—*Browne* v. *Groombridge* (4 Madd. 495), in which a direction to exonerate the general personal estate out of a specific fund of personalty was held to enure for the benefit of persons who took by lapse, not followed:—*Held*, therefore, that the debts, funeral and testamentary expenses, and legacies, must be apportioned rateably between the pure and impure personalty, including the leaseholds; that the real estate and then the leaseholds were to be applied in exonerating the pure personalty from its proportion of debts, &c., and that the charity took the pure personalty,

WILL—*continued.*

subject to so much of that proportion as the freehold and leasehold estates were insufficient to satisfy, and that the Crown took the impure personalty (other than leaseholds) subject to its proportion of debts, &c. KILFORD *v.* BLANEY C. A. 56

5. —— *Children—Illegitimate Children—Codicil.*] The testator, in 1860, was seized with paralysis at the house of his sister-in-law, M. A. L., and her husband, and remained there till his death. M. A. L. had been married seven years, and had by her husband three children, aged sixteen, thirteen, and eleven, born before her marriage with him, but treated as legitimate. The testator was intimate with them. Being worse, he was advised by his medical attendant to make his will, and made one dated the 7th of October, 1860, containing the following dispositions:—"I give and bequeath the following legacies to the following persons (that is to say)," after which followed gifts of legacies to persons named, "and to each of the children of M. A. L. the sum of £5 for mourning, the same to be paid into the hands and on the receipt of the said M. A. L., their mother, for them, notwithstanding her coverture and their minority." On the 5th of August, 1861, he made a codicil, by which he bequeathed £400, on the death of an annuitant, "unto and equally between all the children who shall be then living of M. A. L., share and share alike," and confirmed his will except as varied by the codicil. He died two days afterwards. M. A. L., who was aged forty-four when the will was made, never had any legitimate child. On the death of the annuitant in 1884 the three children claimed the £400, and the executors, one of whom was the residuary legatee, took out an originating summons to have the point decided. Mr. Justice Kay held that the children were not entitled, but gave the costs of all parties out of the £400. The children appealed:—*Held*, by Cotton, L.J., that the Appellants were not entitled, for that no repugnancy or inconsistency in the will would result from giving to the word "children" its proper sense of legitimate children; that the three children, therefore, were not entitled to the £5 legacies, and whether, if they had been so entitled, the word "children" in the distinct gift in the codicil ought to be construed in the same way as in the will, *quære*. But *held*, by Bowen and Fry, L.JJ., that there was enough in the will, as explained by the surrounding circumstances, to shew that the testator used the word "children" in a sense which would apply (whether exclusively or not) to the existing children, and that the word must have a similar interpretation in the codicil, and that the Appellants, therefore, were entitled to the £400:—*Held*, that the costs of the proceedings must be borne by the residuary estate. *In re* HASELDINE. GRANGE *v.* STURDY - - - - C. A. 511

6. —— *Children—Reputed Children.*] G. B. went through the ceremony of marriage with J. A. C., whose husband had deserted her and gone abroad many years before and was believed to be dead, but G. B. was aware that there was no certain information of his death. Shortly afterwards G. B. made his will, by which he gave "to my dear wife J. A. B. formerly J. A. C." an

WILL—*continued.*

interest in certain chattels during her widowhood, and also gave to her the income of his residuary personalty during widowhood, and after her decease or remarriage he gave the corpus to "all and every my child and children," as therein mentioned, and in default of children to his nephews and nieces. G. B. and J. A. C. cohabited for more than a year and a half after the date of the will, when G. B. died leaving J. A. C. enceinte of her only child. She enjoyed the income of the residue till her death, upon which event the nephews and nieces claimed the property under the gift over, and proved that J. A. C.'s child was illegitimate, her former husband having been alive at the time of her marriage to the testator:—*Held*, by the Court of Appeal, affirming the decision of Kay, J., that the child could not take.—*Occleston* v. *Fullalove* (Law Rep. 9 Ch. 147) leaves untouched the rule that there cannot be a valid gift to a future illegitimate child described solely by reference to its paternity.—*In re Goodwin's Trust* (Law Rep. 17 Eq. 345) observed upon.—Whether an illegitimate child en ventre sa mère at the testator's death, but not en ventre sa mère when the will was made, can take as the reputed child of the supposed father, *quære*. *In re* BOLTON. BROWN *v.* BOLTON C. A. 542

7. —— *Children—Class—Per Stirpes or per Capita.*] A testator gave some houses to trustees, upon trust to receive the rents, and to pay the same in equal moieties to his son and his daughter during their lives; and, after the death of either of them without issue living, upon trust to pay the whole thereof to the survivor during the life of such survivor; but, if there should be issue living of the first of them so dying, then upon trust to pay one moiety to the survivor, and to divide the remaining moiety between all and every the child or children of the one so first dying; and, after the decease of the survivor of the son and daughter, on trust to sell the property and to divide the proceeds equally amongst all and every the child or children of each of them the testator's son and daughter who should attain twenty-one, in equal shares and proportions, to be paid at twenty-one:—*Held*, that the proceeds of sale were divisible among the grandchildren per stirpes and not per capita. *Brett* v. *Horton* (4 Beav. 239) followed. *Nockolds* v. *Locke* (3 K. & J. 6) explained and distinguished. *In re* CAMPBELL'S TRUSTS - - - - 685

8. —— *Copyholds—"My freehold farm and lands."*] A testator devised a farm by the description of "my freehold farm and lands situate at Edgware, and now in the occupation of James Bray." The will contained no residuary devise. The farm comprised about seventy-six acres, of which twenty-six were copyhold,—*Held*, that the copyhold parts of the farm passed under the devise. *Hall* v. *Fisher* (1 Coll. 47) and *Stone* v. *Greening* (13 Sim. 390) discussed and questioned. *In re* BRIGHT-SMITH. BRIGHT-SMITH *v.* BRIGHT-SMITH - - - - - - 314

9. —— *Executory Devise—Repugnancy—Death of Devisee leaving Issue—Period of happening of Contingency.*] A testator devised real estate to his son and his heirs; and then declared that in

WILL—*continued.*

case his said son should die without leaving lawful issue, then and in such case the estate should go to his son's next heir-at-law, to whom he gave and devised the same accordingly:—*Held*, that the contingency of death without leaving issue was not confined to death in the lifetime of the testator, but referred to death at any time; and that the gift over was repugnant and void; and that the devisee took an absolute estate in fee simple. *In re* Parry and Daggs C. A. 130

10. —— *Vesting—Gift in Remainder—Death of Remainderman before Tenant for life—"Entitled"—Interest "in right" or "in possession."*] By a testamentary appointment a testatrix gave three copyhold houses to E. for life, and after his death she directed the houses to be sold and the proceeds "to be equally divided amongst" her three nephews and niece, "but should either of my said nephews or niece die before they are entitled to the property, leaving issue, I give the share of him or her so dying to his or her child or children." All the remaindermen survived the testatrix, but three of them predeceased E., leaving children living at his death:—*Held*, that "entitled," meant entitled "in possession," and that

WILL—*continued.*

therefore the shares of the three deceased remaindermen did not pass to their legal personal representatives, but to their children.—*Commissioners of Charitable Donations* v. *Cotter* (1 D. & War. 498) distinguished. *In re* Noyce. Brown *v.* Rigg - - - - 75

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—— "Entitled" - - - - 75
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—— "Free from all deductions" - 142
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—— "Freehold farm and lands" - 314
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—— "Next heir-at-law" - - - 130
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